

REVOCATION WITHOUT CONFRONTATION

*Amanda Peters**

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* Associate Dean for Faculty and Professor of Law, South Texas College of Law Houston. J.D., Texas Tech University Law School. B.A. Texas Tech University. I would like to thank my family and my employer for supporting this Article. I would also like to thank the scholars at the 2024 Texas Criminal Scholars Workshop at the University of Houston Law School, Assistant Professors Claire Andresen and Tom Hogan, who I am proud to call colleagues at South Texas College of Law Houston, and Associate Professor Alexandra Klein at Washington and Lee University School of Law for feedback on earlier drafts of this article.

I. INTRODUCTION

Community supervision, whether probation or deferred adjudication,¹ is the most popular criminal punishment in America.² While it used to be reserved for defendants who others believed could be rehabilitated, policymakers deemed it should be made available to all but the worst criminal offenders.³ The criminal justice system also lacks sound alternatives, which makes probation a necessity.⁴ Defendants prefer probation because they believe it guarantees immediate freedom from incarceration, but it may result in delayed imprisonment.⁵

The desirability of community supervision leads individuals to choose it when they are unlikely to successfully complete it or when they are not good candidates.⁶ Judges routinely revoke community supervision due to condition violations.⁷ Courts are more likely to incarcerate defendants when they commit new crimes while on probation or have multiple violations.⁸ When they do, defendants may serve longer sentences than those they would have received had they initially chosen incarceration.⁹

Approximately one in sixty-nine adults, nearly four million people, are on probation in the United States.¹⁰ Only forty percent complete community

1. See *Tapia v. State*, 462 S.W.3d 29, 40 n.2 (Tex. Crim. App. 2015) (describing the differences between “community supervision,” “probation,” and “deferred adjudication”); Jacob Schuman, *Revocation at the Founding*, 122 MICH. L. REV. 1381, 1389–90 (2024) (describing the differences between probation, parole, and supervised release in the federal system). Though deferred adjudication’s process of revocation is called adjudication, this Article will refer to all forms of unsuccessful termination as “revocation” and primarily refer to probation.

2. Eric S. Fish, *The Constitutional Limits of Criminal Supervision*, 108 CORNELL L. REV. 1375, 1386 (2023).

3. Andrew Horwitz, *The Costs of Abusing Probationary Sentences: Overincarceration and the Erosion of Due Process*, 75 BROOK. L. REV. 753, 758 (2010).

4. *Id.* at 760.

5. Cecelia Klingele, *Rethinking the Use of Community Supervision*, 103 J. CRIM. L. & CRIMINOLOGY 1015 (2013).

6. *Id.*

7. See Jacob Schuman, *Criminal Violations*, 108 VA. L. REV. 1817, 1823 (2022) [hereinafter Schuman I] (estimating that one-third of people violate their probation, which results in 350,000 imprisonments each year); DANIELLE KAEBLE, DEP’T OF JUST., NCJ 305589, PROBATION AND PAROLE IN THE UNITED STATES, 2021 (Feb. 2023), <https://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/ppus21.pdf>.

8. Horwitz, *supra* note 3, at 762.

9. *E.g.*, Laura I. Appleman, *Retributive Justice and Hidden Sentencing*, 68 OHIO ST. L.J. 1307, 1365 (2007) (“Often state court judges have the ability to lengthen the sentence at a probation violation proceeding.”); Horwitz, *supra* note 3, at 765 (noting that judges may incarcerate defendants following a revocation to maintain credibility). The U.S. Supreme Court held that increased punishments following revocation of supervised release in *United States v. Haymond* violated the Due Process Clause and the Sixth Amendment right to a jury trial. *United States v. Haymond*, 588 U.S. 634, 637–46 (2019). *Haymond* only applied to federal cases; this Article addresses state cases, primarily Texas law.

10. KAEBLE, *supra* note 7, at 1.

supervision successfully.¹¹ The probation revocation process has been called “a shadow criminal justice system” and a form of “hidden sentencing.”¹²

This shadow system raises legitimate constitutional issues.¹³ This Article addresses the right to confrontation at these hearings.¹⁴ The Supreme Court has held the Fourteenth Amendment’s Due Process Clause, not the Sixth Amendment’s Confrontation Clause, applies to these hearings.¹⁵ The hearings have relaxed confrontation standards.¹⁶

The Fourteenth Amendment protects citizens from having their liberty taken away without due process; any probation-ending process must be fundamentally fair.¹⁷ However, the liberty probationers experience is labeled “conditional,” thus the Supreme Court inadvertently gave states license to undercut due process rights at these hearings.¹⁸ This can result in an inability to confront witnesses and weakened due process guarantees.¹⁹

Probationers have argued Texas judges have denied them the right to confront witnesses who allege they violated probation conditions.²⁰ They argue the Sixth Amendment’s Confrontation Clause grants them the right to confront these accusers.²¹ They complain judges admit unreliable hearsay, sometimes double and triple hearsay, and revoke probation based on witnesses who lack personal knowledge or offer unreliable testimonial statements.²² Testimonial statements in these hearings may come from witnesses who seek to establish or prove past events that are relevant to the revocation process or later criminal prosecution.²³

Defendants have raised complaints about denied confrontation rights in revocation proceedings for decades.²⁴ But in the last few years, Texas

11. *Id.* at 5.

12. Daniel F. Piar, *A Uniform Code of Procedure for Revoking Probation*, 31 AM. J. CRIM. L. 117, 118 (2003); Appleman, *supra* note 9, at 1307 (describing community supervision as hidden sentencing).

13. Appleman, *supra* note 9, at 1307 (mentioning constitutional and theoretical concerns).

14. *See infra* Parts II–V (discussing different holdings regarding confrontation rights at revocation hearings).

15. *See Morrissey v. Brewer*, 408 U.S. 471, 480 (1972); *Gagnon v. Scarpelli*, 411 U.S. 778, 782 (1973).

16. *See Morrissey*, 408 U.S. at 489; *Scarpelli*, 411 U.S. at 786.

17. U.S. CONST. amend XIV; *Euler v. State*, 218 S.W.3d 88, 91 (Tex. Crim. App. 2007) (“[N]o State may deprive any person of the conditional liberty created by probation unless the State employs procedures that are fundamentally fair.”).

18. *See Scarpelli*, 411 U.S. at 781.

19. *See infra* Section V.B.1 (arguing a weakened due process standard stems from the Court’s use of conditional liberty).

20. *E.g.*, *Dupas v. State*, No. 07-22-00117-CR, 2022 WL 5052714, at *1 (Tex. App.—Amarillo Oct. 4, 2022, pet. ref’d) (mem. op., not designated for publication) (affirming trial court’s decision despite probationer alleging that it violated his Sixth Amendment right to confront and cross-examine witnesses by admitting a community supervision file).

21. *See id.*

22. *See infra* Section IV.C (detailing state procedures for revocation proceedings).

23. *Davis v. Washington*, 547 U.S. 813, 822 (2006).

24. *See infra* Part III (detailing the Supreme Court’s response to issues regarding revocation hearings over time).

intermediate appellate courts have split on the issue.²⁵ At least eight Texas appellate courts have held the Sixth Amendment Confrontation Clause does not apply to probation revocation hearings because they are not considered a “criminal proceeding.”²⁶ To complicate matters, two of these courts have also held that the Confrontation Clause does apply without overruling their earlier conflicting decisions.²⁷ Another two have held the Sixth Amendment applies to revocation proceedings without contradictory holdings.²⁸ In the years these splits surfaced, the Texas Court of Criminal Appeals has heard at least three cases without resolving the split.²⁹ In recent years, the Court has also had numerous opportunities to grant petition for discretionary review in cases that raised this issue, but it has refused to do so.³⁰ The fact that it has not resolved

25. See *Cunningham v. State*, 673 S.W.3d 280, 288–89 (Tex. App.—Texarkana 2023, no pet.).

26. E.g., *Inman v. State*, No. 13-20-00349-CR, 2022 WL 709832, at *3 (Tex. App.—Corpus Christi—Edinburg Mar. 10, 2022) (declining to deviate from precedent holding that the Confrontation Clause does not apply), *pet. dismissed*, No. PD-0251-22, 2023 WL 3495573 (Tex. Crim. App. 2023) (per curiam); *Olabode v. State*, 575 S.W.3d 878, 881 (Tex. App.—Dallas 2019, *pet. refused*) (affirming the admission of summary of appellant’s probation file over Confrontation Clause objection); *White v. State*, No. 02-21-00059-CR, 2022 WL 623450, at *6 (Tex. App.—Fort Worth Mar. 3, 2022, no pet.) (mem. op., not designated for publication) (deciding the admission of exhibits in probation revocation did not violate the Confrontation Clause); *Sabella v. State*, 578 S.W.3d 137, 142 (Tex. App.—Texarkana 2019, no pet.) (stating there are no cases that have expressly held the Confrontation Clause applies to probation revocation hearings); *Mauro v. State*, 235 S.W.3d 374, 375–76 (Tex. App.—Eastland 2007, *pet. refused*) (relying on intermediate court rulings to determine that the Confrontation Clause does not apply to revocation hearings); *Trevino v. State*, 218 S.W.3d 234, 239 (Tex. App.—Houston [14th Dist.] 2007, no pet.) (holding that the Confrontation Clause does not apply to post-conviction hearings); *Diaz v. State*, 172 S.W.3d 668, 669 (Tex. App.—San Antonio 2005, no pet.) (holding the Confrontation Clause does not apply because revocation is not a stage of criminal prosecution); *Smart v. State*, 153 S.W.3d 118, 121 (Tex. App.—Beaumont 2005, *pet. refused*) (discussing the application of the Confrontation Clause to revocation hearings).

27. Compare *Hughes v. State*, 651 S.W.3d 461, 470 (Tex. App.—Houston [14th Dist.] 2022, *pet. granted*) (holding that Confrontation Clause applies to revocation hearings), *aff’d* 691 S.W.3d 504 (Tex. Crim. App. 2024), with *Trevino*, 218 S.W.3d at 239 (holding that Confrontation Clause does not apply). Compare *Cunningham*, 673 S.W.3d at 290 (holding that Confrontation Clause applies to revocation hearings), with *Sabella*, 578 S.W.3d at 142 (holding it was reasonable for counsel to believe that the Confrontation Clause did not apply to revocation hearings).

28. *Blackman v. State*, No. 01-12-00525-CR, 2014 WL 50804, at *3 (Tex. App.—Houston [1st Dist.] Jan. 7, 2014, *pet. refused*); *Bacilio v. State*, No. 08-14-00096-CR, 2016 WL 1253420, at *3 (Tex. App.—El Paso Mar. 30, 2016, *pet. refused*) (not designated for publication).

29. *Ex parte Doan*, 369 S.W.3d 205, 209–13 (Tex. Crim. App. 2012) (choosing to address a res judicata issue, not the inconsistent revocation law in Texas); *Inman*, No. PD-0251-22, 2023 WL 3495573, at *1 (Tex. Crim. App. May 17, 2023) (per curiam) (noting that the Court “granted review of the Confrontation Clause issue” but concluding the “decision to grant review was improvident”); *Hughes*, 691 S.W.3d at 521 (Tex. Crim. App. 2024) (“As to whether the Confrontation Clause applies in hearings on motions to adjudicate guilt, that question will have to wait until another day.”); see also *Torres v. State*, 617 S.W.3d 95, 101 (Tex. App.—Houston [1st Dist.] 2020, *pet. refused*) (stating that because the Court of Criminal Appeals has not ruled on the issue, the matter is unsettled in Texas).

30. E.g., *Blackman*, 2014 WL 50804, at *3 (declining discretionary review after the Houston Court of Appeals overruled appellant’s point of error on Confrontation Clause objection); *Bacilio*, 2016 WL 1253420, at *3 (refusing discretionary review after the El Paso Court of Appeals assumed Confrontation Clause objection may be raised in revocation proceeding); *Anthony v. State*, No. 03-17-000327-CR, 2019 WL 639492, at *3 (Tex. App.—Austin Feb. 15, 2019, *pet. refused*) (mem. op., not designated for publication) (declining discretionary review after the Austin Court of Appeals affirmed the appellant’s revocation of

the split has frustrated nearly half of the judges on the Court of Criminal Appeals.³¹ That Texas cannot agree on the issue may be evidence that the law needs to be re-evaluated or settled.

The confused and unsettled state of the law can be traced back to the United States Supreme Court and the Texas appellate courts.³² The Supreme Court's decision that defendants have a limited confrontation right at a revocation hearing should never have applied to Texas.³³ In two 1970s cases, the Supreme Court declared a new legal standard, relying on parole law in Iowa and probation law in Wisconsin.³⁴ At the time, the Texas Court of Criminal Appeals recognized these two states' processes looked nothing like those in Texas.³⁵ But somewhere along the line, Texas courts blurred the demarcation line.³⁶

It took the Court of Criminal Appeals forty years to rediscover that line and the fact the Supreme Court's recommended process does not work in Texas.³⁷ Courts in Texas are now split on what confrontation rights, if any, are owed to probationers in revocation hearings, and whether these two U.S. Supreme Court cases apply in Texas.³⁸ States often provide more rights than the minimum set by the Supreme Court, but some states replaced Supreme Court minimums in revocations with their own processes that were richer in rights.³⁹

This Article examines the right to confrontation in the context of probation revocation proceedings,⁴⁰ first nationally,⁴¹ second in other states,⁴² and third, in Texas.⁴³ It advocates granting full confrontation rights to people facing revocation because it is warranted given the liberty interests at stake

community supervision); *Olabode*, 575 S.W.3d at 881 (refusing discretionary review after the Dallas Court of Appeals affirmed admission of probation file and violations); *Guillory v. State*, 652 S.W.3d 923, 927 (Tex. App.—Eastland 2022, pet. ref'd) (denying discretionary review in a case involving the Confrontation Clause at revocation hearings).

31. See *Inman*, 2023 WL 3495573, at *2 (Keel, J., dissenting).

32. See *infra* Parts III–IV (discussing different holdings regarding confrontation rights at revocation hearings).

33. See *Doan*, 369 S.W.3d at 208–10 (explaining why the process the Supreme Court described in *Scarpelli* is not at all like the one in Texas).

34. *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972); *Gagnon v. Scarpelli*, 411 U.S. 778, 782 (1973).

35. *Whisenant v. State*, 557 S.W.2d 102, 103 (Tex. Crim. App. 1977) (“In both *Morrissey v. Brewer* . . . and *Gagnon v. Scarpelli* . . . the Supreme Court of the United States considered procedures far different from those in this state.”).

36. Compare *id.* (recognizing the difference in Texas law and the state laws relied on in *Morrissey* and *Scarpelli*), with *Smart v. State*, 153 S.W.3d 118, 121 (Tex. App.—Beaumont 2005, pet. ref'd) (agreeing with the Supreme Court that revocation hearings are administrative in nature).

37. See *Doan*, 369 S.W.3d at 208–10.

38. See *id.* at 209–210.

39. See, e.g., *People v. Gray*, 533 P.3d 519, 523 (Cal. 2023) (exemplifying California as one such jurisdiction).

40. See *infra* Part II (explaining the probation revocation process in Texas).

41. See *infra* Part III (discussing the role of due process in revocation hearings).

42. See *infra* Part III (explaining how due process functions within state revocation hearings).

43. See *infra* Part IV (discussing Texas revocation hearings).

and the need to base revocation decisions on trustworthy evidence of the violations.⁴⁴ The Sixth Amendment confrontation right should apply to revocation proceedings based on the text and history of the Constitution.⁴⁵ If courts rule it does not, the Due Process Clause requires, at a minimum, that the State produce credible evidence through live testimony with a mandatory good cause finding if that is not possible.⁴⁶ The concept of conditional liberty is a fallacy and limiting rights to confront witnesses is unacceptable.⁴⁷ Finally, this Article argues that the adversarial nature of revocation hearings in Texas and elsewhere renders the two U.S. Supreme Court cases that dictated lesser rights for those facing revocation inapplicable.⁴⁸

II. THE PROBATION AND REVOCATION PROCESS

To understand the constitutional concerns with the process of revocation hearings, it is important to first examine the basis for revocation, the hearing that follows, and what evidence may be admitted to prove probation violations.⁴⁹ This Section will explain the process of probation revocation in Texas.⁵⁰

A. Basis for Revocation

The Texas Code of Criminal Procedure defines community supervision, which encompasses both probation and deferred adjudication, as “the placement of a defendant by a court under a continuum of programs and sanctions, with conditions imposed by the court for a specified period.”⁵¹ Appellate courts have described the relationship between the court and the probationer as contractual.⁵² When a person asks for and receives community supervision, the defendant has a right to remain free in the community.⁵³ The judge can revoke that right if the person violates the established conditions of the supervision.⁵⁴

44. See *infra* Sections II.B, IV.D, V.B (explaining why greater confrontation rights are necessary).

45. See *infra* Part V (examining constitutional background to advocate for applying the confrontation right to revocation proceedings).

46. See *infra* Section V.B (explaining the State’s burden to rely on sound evidence).

47. See *infra* Section V.B (describing how the courts have used “conditional liberty” to deny confrontation).

48. See *infra* Section V.C (analyzing the nature of the proceedings in *Morrissey* and *Scarpelli*).

49. See *infra* Part V (discussing constitutional issues arising in the revocation process).

50. See *infra* Section II.A–B (explaining the process of revocation and how procedure in Texas is unique).

51. TEX. CODE CRIM. PRO. art. 42A.001(1); see also Appleman, *supra* note 9, at 1363 (“In many states, a term of probation means a suspension of the execution of a sentence and an order of conditional and revocable release under the supervision of a probation officer.”).

52. See *Smart v. State*, 153 S.W.3d 118, 120 (Tex. App.—Beaumont 2005, pet. ref’d).

53. E.g., TEX. CODE CRIM. PROC. art. 42A.001(1)(B) (explaining the suspension of a sentence during community supervision).

54. *Id.* art. 42A.751.

Some conditions are designed to keep the defendant from reoffending, some are designed to rehabilitate, while others require the defendant to restore or give back to the community affected by the underlying crime.⁵⁵ The conditions may be crime-specific or defendant-specific.⁵⁶ For example, a defendant convicted of a stalking offense will be ordered not to contact the victim as a condition of probation.⁵⁷ A defendant convicted of a sexual assault must submit a DNA sample as a condition of probation.⁵⁸ These conditions are related to the specific crime and its harms to victims and the community, as well as preventing future crimes.⁵⁹ Some conditions serve a different purpose. A defendant who has been identified in a gang-member database may be required to wear an electronic monitoring device so the probation officer can track the person's location at all times.⁶⁰ A defendant whose substance abuse contributed to the person's criminality can be ordered to receive substance abuse treatment as a condition of probation.⁶¹ These conditions address the defendants' personal circumstances that relate to the original crime or potential future crimes. The goal of community supervision is to prohibit criminal and dangerous behavior while restoring the individual to become a productive member of the community.⁶² A decision to revoke or reinstate a defendant's probation is directly tied to the possibility of the person's rehabilitation and continued success in the community.⁶³

A defendant who is placed on community supervision and abides by the conditions lives freely in the community.⁶⁴ If a defendant fails to abide by these conditions, the probation officer files a motion to revoke probation.⁶⁵ This triggers an adversarial hearing, usually before the same judge who granted the defendant probation, to assess whether the alleged condition violations are true.⁶⁶ If the judge finds the defendant violated probation, the judge has four options: revoke probation and sentence the defendant to jail or prison for condition violations; close the motion to revoke for failure to establish condition violations; extend probation and possibly add conditions;

55. See generally *id.* art. 42A.301 (describing appropriate reasonable conditions as those “designed to protect or restore the community, protect or restore the victim, or punish, rehabilitate, or reform the defendant”).

56. See *id.*

57. *Id.* art. 42A.505(a).

58. *Id.* art. 42A.451(2).

59. See *id.* arts. 42A.451(2), 42A.505(a).

60. *Id.* art. 42A.507.

61. *Id.* art. 42A.303.

62. See TEX. CODE CRIM. PROC. art. 42A.301; Jacob Schuman, *One Nation Under Supervision*, 34 FED. SENT. R. 269, 269 (2022) [hereinafter Schuman II].

63. WAYNE R. LAFAVE ET AL., *THE ADVERSARY SYSTEM AND THE DETERMINATION OF GUILT AND INNOCENCE*, § 26.10(b) (4th ed. 2024).

64. See Appleman, *supra* note 9, at 1363.

65. See *Selby v. State*, 525 S.W.3d 842, 852 (Tex. App.—Beaumont 2017, no pet.); *Rhodes v. Torres*, 901 S.W.2d 794, 798 (Tex. App.—Houston [14th Dist.] 1995, no writ).

66. See *Richards v. State*, 657 S.W.2d 174, 174 (Tex. App.—Waco 1983, no writ).

or reinstate probation, effectively granting the person a second chance to complete the original probation the judge ordered.⁶⁷

Whether the defendant remains on probation following allegations of condition violations depends on the original crime and punishment, the defendant's characteristics, and the government's evidence of violations, among other things.⁶⁸ The court must balance the community's safety against the possibility of rehabilitating the defendant.⁶⁹ The outcome also depends heavily on the temperament of the judge.⁷⁰

There is evidence that judges punish certain violations more harshly.⁷¹ While federal supervised release is vastly different than state community supervision, a study revealed that federal judges punish violations tied to the commission of new crimes more harshly.⁷² In a different federal study, researchers found that nearly two-thirds of revocations for probation, supervised release, and parole were due to new criminal conduct.⁷³

In any revocation hearing, the judge may shift from a presumptive "free" sentence, with the defendant living in the community on probation or deferred adjudication, to a sentence of incarceration.⁷⁴ A judge may impose a harsher sentence following revocation.⁷⁵ Punishments following revocation have been so high that defendants have raised vindictiveness claims, some of which have been successful on appeal.⁷⁶ Even with minor condition violations, the defendant is at risk of a much greater sentence before a judge who may take the violations personally.⁷⁷ There is even a federal sentencing

67. *E.g.*, *Burns v. United States*, 287 U.S. 216, 220–22 (1932) (stating the judge has wide latitude and flexibility in adding conditions, modifying, revoking, discharging, terminating, or changing the terms of the probation).

68. *Ex parte Doan*, 369 S.W.3d 205, 212 (Tex. Crim. App. 2012).

69. *Id.*

70. *See generally* TEX. CODE CRIM. PROC. art. 42A.751–42A.754 (appointing judge as monitor and authority over community supervision).

71. *See Schuman I*, *supra* note 7, at 1844–48.

72. *Id.*

73. TRACEY KYCKELHAHN & S. ALEXANDER MAISEL, U.S. SENT'G COMM'N, REVOCATIONS AMONG FEDERAL OFFENDERS 12 (2019), https://www.usc.gov/sites/default/files/pdf/research-and-publications/research-publications/2019/20190131_Revocations.pdf.

74. *Appleman*, *supra* note 9, at 1363–64.

75. *E.g.*, *Bowden v. State*, 627 S.W.2d 834, 836 (Tex. App.—Fort Worth 1982, no pet.) (an "affirmative finding would supply justification for imposing a more severe sentence"); *New Hampshire v. Field*, 571 A.2d 1276, 1278 (N.H. 1990) (noting concerns about the defendant's "augmented sentence").

76. *E.g.*, *Longley v. State*, 902 So. 2d 925, 926–29 (Fla. Dist. Ct. App. 2005) (finding judge vindictive when his sentence was five times higher and made in part off the record, making it impossible for appellate court to review); *Schuman I*, *supra* note 7, at 1868 (describing a federal case in which the judge's decision to increase punishment was based on feelings that the defendant thumbed his nose at the judiciary).

77. *E.g.*, *United States v. Delgado*, 106 F.4th 185, 190–91 (1st Cir. 2024) (district court cited numerous reasons for increasing defendant's punishment threefold, including cost of treatment and needing to instill respect for the law); *United States v. Simtob*, 485 F.3d 1058, 1063 (9th Cir. 2007) (finding the defendant's conduct "offensive" and stating that "the violator has little respect for [the court's] command").

theory that suggests the defendant is punished not for the violation, but for a breach of trust.⁷⁸

Some condition violations, like failure to pay probation fees or complete community service hours, are considered “technical” violations; they make up roughly half of all revocations in the federal system.⁷⁹ In state courts, probation officers are less likely to seek judicial revocation for technical violations until there are several; judges may be less inclined to revoke based upon them.⁸⁰ Regardless, a revocation often results in the person returning to jail or prison.⁸¹

B. Confrontation Concerns

The U.S. Supreme Court determined that revocation and adjudication proceedings should be informal in nature.⁸² Relaxed hearsay and evidentiary rules apply.⁸³ The right to confront witnesses is relaxed.⁸⁴ With informality and lax evidentiary standards, it is much easier to rest revocation on hearsay and unreliable evidence.⁸⁵ The process can become a mere formality.⁸⁶

The physical evidence and testimony in a revocation hearing mirror what might be admitted during the punishment phase at trial, but the conditions of admission are relaxed.⁸⁷ The defendant may make it easier to prove the condition violations by stipulating to them, making incriminating statements, or by making judicial confessions during the hearing on the motion to revoke or adjudicate.⁸⁸ In the event the Government does not have

78. Schuman I, *supra* note 7, at 1841–42.

79. *E.g.*, United States v. Winfield, 665 F.3d 107, 109 (4th Cir. 2012) (“technical” violations are those unrelated to the commission of new crimes); Schuman I, *supra* note 7, at 1844 (stating that criminal violations account for the other half of revocations).

80. *E.g.*, Megan M. Sulok & Shobha L. Mahadev, *Extended Jurisdiction Juvenile Prosecutions: To Revoke or Not to Revoke*, 39 LOY. U. CHI. L.J. 215, 218–19 (2007) (explaining that juvenile court judges have discretion to revoke community supervision for technical violations but should only do so as a last resort); Derek T. Cantrell, Comment, *Improper Implementation: Mississippi House Bill 585’s Missed Opportunity for Fundamental Fairness and Open Door for Litigation*, 84 MISS. L.J. SUPRA 205, 211 (2015) (commenting on technical violations in Mississippi courts).

81. Schuman II, *supra* note 62, at 269 (federal revocations resulted in “an average eleven-month prison sentence and account[ed] for 15% to 20% of all federal sentencing”).

82. *See* Gagnon v. Scarpelli, 411 U.S. 778, 786–87 (1973).

83. *See id.*

84. Horwitz, *supra* note 3, at 754.

85. *See* LAFAYETTE ET AL., *supra* note 63, § 26.10(c) (“Some lower courts have taken this to mean that revocation cannot be based exclusively on hearsay.”).

86. Lara Montecalvo, Kara Maguire & Angela Yingling, *No Exit, No End: Probation in Rhode Island*, 21 ROGER WILLIAMS U.L. REV. 316, 322–23 (2016).

87. *See* Morrissey v. Brewer, 408 U.S. 471, 475, 481, 489 (1972); *Scarpelli*, 411 U.S. at 788.

88. *E.g.*, Franco v. State, 552 S.W.2d 142, 142 (Tex. Crim. App. 1977) (stipulation to violations); *Hodge v. State*, No. 07-96-0006-CR, 1996 WL 523837, at *1 (Tex. App.—Amarillo Sep. 16, 1996, no pet.) (judicial confessions); *Lara v. State*, 962 S.W.2d 148, 149-51 (Tex. App.—San Antonio 1998, no pet.) (stipulations arose from admitting the commission of another offense outside of the revocation hearing).

these admissions, it may use records to prove defendants violated probation conditions.⁸⁹ Records that merely recite infractions, such as jail disciplinary records, do not raise constitutional confrontation concerns because they do not implicate testimonial statements.⁹⁰ The hearsay is only testimonial if it is “made for the purpose of establishing” a fact.⁹¹ However, many records used in these proceedings do contain hearsay, maybe even hearsay within hearsay.⁹² For example, a probation supervisor’s testimony may include incriminating statements the defendant made to another probation officer who is not present at the hearing, making those statements inadmissible hearsay.⁹³ This raises confrontation concerns when the person facing revocation cannot cross-examine testimonial statements, or when the judge rests revocation upon unchallengeable and unreliable hearsay.⁹⁴

The type of hearsay in probation revocation hearings is common. Witnesses at these hearings read probation file notations made by the person’s supervision probation officer who documented information or conversations with others in anticipation of the revocation hearing.⁹⁵ Statements like these are viewed as “unsworn, *ex parte* affidavits of government employees” which are “the very type of evidence the [Confrontation] Clause was intended to prohibit.”⁹⁶ This type of evidence can fairly be characterized as the classic testimonial statement in a criminal case

89. See *Morrissey*, 408 U.S. at 487.

90. See *Ford v. State*, 179 S.W.3d 203, 209 (Tex. App.—Houston [14th Dist.] 2005, pet. ref’d).

91. *Crawford v. Washington*, 541 U.S. 36, 51 (2004).

92. *E.g.*, *Grant v. State*, 218 S.W.3d 225, 227–28, 232 (Tex. App.—Houston [14th Dist.] 2007, pet. ref’d) (holding that the trial court erroneously allowed some testimonies into the record because the State failed to show that people who made the statements were unable to testify and had been previously cross-examined); Appellant’s Amended Brief, at 19–20, *Inman v. State*, No. 13-20-00349-CR, 2022 WL 709832 (Tex. App.—Corpus Christi–Edinburg Mar. 10, 2022), 2021 WL 1344592, at *20 [hereinafter Appellant Inman’s Amended Brief] (stating that defense counsel objected to a urinalysis report and testimony of a mental health coordinator who testified about statements the defendant made to her probation officer); *Commonwealth v. Hamilton*, 132 N.E.3d 954, 960 (Mass. App. Ct. 2019) (stating that witness’s “testimony, which was multileveled hearsay, was not substantially reliable”); *Commonwealth v. Allshouse*, 969 A.2d 1236, 1241 (Pa. Super. Ct. 2009) (holding it was double hearsay when a probation officer summarized police reports describing the incident).

93. Appellant Inman’s Amended Brief, *supra* note 92, at *20.

94. See *Ohio v. Roberts*, 448 U.S. 56, 66 (1980), *abrogated by*, *Crawford v. Washington*, 541 U.S. 36 (2004) (“[H]earsay rules and the Confrontation Clause are generally designed to protect similar values,” and “stem from the same roots.”) (first quoting *California v. Green*, 399 U.S. 149, 155 (1970); and then quoting *Dutton v. Evans*, 400 U.S. 74, 86 (1970) (internal citations omitted)).

95. *E.g.*, *Blackman v. State*, No. 01-12-00525-CR, 2014 WL 50804, at *2 (Tex. App.—Houston [1st Dist.] Jan. 7, 2014, pet. ref’d) (mem. op., not designated for publication) (State called one probation officer who testified about the defendant’s probation officer’s file); *Cunningham v. State*, 673 S.W.3d 280, 286 (Tex. App.—Texarkana 2023, no pet.) (State called defendant’s probation officer’s supervisor, who had no personal knowledge, to read from a probation file). This is common in other jurisdictions as well. *E.g.*, *Prellwitz v. Berg*, 578 F.2d 190, 192 (7th Cir. 1978) (probation report was a “conventional substitute[] for live testimony”) (internal quotations omitted).

96. *Rousseau v. State*, 171 S.W.3d 871, 881 (Tex. Crim. App. 2005) (italics in original).

made in anticipation of an adversarial proceeding.⁹⁷ Testimonial statements include those taken outside the courtroom, statements from witnesses the defendant cannot cross-examine, affidavits, and statements made by witnesses who would reasonably expect to be used in the person's prosecution.⁹⁸ Were these statements offered at trial, they would be inadmissible hearsay under *Crawford v. Washington*.⁹⁹

The probation file itself may be admitted as a business record to prove violations.¹⁰⁰ Probation reports may contain testimonial hearsay, written observations, or narratives authored by the declarant, authored by a probation officer who is not the declarant, or statements relayed to the officer by others.¹⁰¹ One court stated there is a difference between "official records that set out a sterile and routine recitation of an official finding or unambiguous factual matter such as a judgment of conviction or a bare-bones disciplinary finding and a factual description of specific observations or events . . . akin to testimony."¹⁰² These files may or may not be admissible depending on whether they contain testimonial statements or were produced to be used as evidence.¹⁰³

Hearsay is such a problem at these hearings that some jurisdictions have created rules to address revocations based solely on hearsay.¹⁰⁴ Even in these

97. Appellant Inman's Amended Brief, *supra* note 92, at *27; GEORGE E. DIX & JOHN M. SCHMOLENSKY, TEXAS PRACTICE SERIES: CRIMINAL PRACTICE AND PROCEDURE § 48.53 (3d ed.) (citing *Frazier v. State*, 600 S.W.2d 271, 277 (Tex. Crim. App. 1979) (on motion for reh'g) (en banc)); *see* TEX. R. EVID. 80.

98. *Crawford*, 541 U.S. at 51–52.

99. *See id.* at 59; *Rousseau*, 171 S.W.3d at 880–81. Most courts have held that *Crawford* does not apply to probation revocation hearings. *E.g.*, *Russell v. State*, 982 So. 2d 642, 645–46 (Fla. 2008) (*Crawford* addresses the use of testimonial hearsay only in the context of criminal prosecutions, not revocation hearings); *State v. Pompey*, 934 A.2d 210, 214 (R.I. 2007) (statements inadmissible in a criminal prosecution under *Crawford* may still be considered in probation revocation hearings because such hearings are not subject to the Confrontation Clause).

100. *E.g.*, *Cunningham*, 673 S.W.3d at 286 ("Reading from Marcum's report, Allen testified that Cunningham's preliminary urinalysis testing on June 14 was positive for methamphetamine . . .").

101. *Jackson v. State*, No. AP-75,707, 2010 WL 114409, at *4 (Tex. Crim. App. Jan. 13, 2010) (not designated for publication).

102. *Id.* at *5; *see* *Segundo v. State*, 270 S.W.3d 79, 107 (Tex. Crim. App. 2008).

103. *E.g.*, *Smart v. State*, 153 S.W.3d 118, 120–21 n.1 (Tex. App.—Beaumont 2005, pet. ref'd) (affirming trial court's decision to admit defendant's probation file as a business record because it was not testimonial); *Diaz v. State*, 172 S.W.3d 668, 672 (Tex. App.—San Antonio 2005, no pet.) (affirming the trial court's decision to admit testimony of a police officer under the excited utterance hearsay exception); *Blackman v. State*, No. 01-12-00525-CR, 2014 WL 50804, at *3 (Tex. App.—Houston [1st Dist.] Jan. 7, 2014, pet. ref'd) (mem. op., not designated for publication) (business records that are testimonial or produced as evidence for trial are inadmissible).

104. *E.g.*, *Sams v. State*, 48 So. 3d 665, 668 (Ala. 2010) (explaining that when hearsay is used as evidence to support revocation, it must be reliable and requires additional evidence that does not involve hearsay); *Collins v. State*, 897 A.2d 159, 160–61 (Del. 2006) ("[P]robation cannot be revoked solely upon the basis of testimony of a witness with 'no first-hand knowledge of the events constituting the violations.'"); *Laing v. State*, 200 So. 3d 166, 168 (Fla. Dist. Ct. App. 2016) (requiring revocation to be based on a determination of a willful and substantial violation of a probation condition supported by sufficient evidence); *Commonwealth v. Durling*, 551 N.E.2d 1193, 1199 (Mass. 1990) (holding that if good cause is shown for not using a witness that has personal knowledge of the incident, reliable hearsay

jurisdictions, “courts have resorted to technical gymnastics in order to uphold revocations based on hearsay.”¹⁰⁵ When the reliability of the source cannot be challenged, the judge revokes *and* sentences on potentially unreliable information.¹⁰⁶ That sentence and failed probation may then be used to enhance future criminal cases and increase future criminal sentences.¹⁰⁷

Courts may revoke community supervision based on testifying witnesses who lack first-hand knowledge, who are merely repeating statements made to others.¹⁰⁸ Here are two examples. In one case, jail disciplinary records, read by a third party at the hearing, included personal observations by guards and testimonial statements from people who described witnessing the defendant’s criminal behavior; none of the witnesses with purported first-hand knowledge were present or subject to cross-examination.¹⁰⁹ In another case, probation supervisors testified about hearsay statements, lab reports, and results from technicians who did not attend the hearing.¹¹⁰

This kind of hearsay and double hearsay would be considered inadmissible “surrogate” testimony at trial “created solely for an ‘evidentiary purpose’” under *Bullcoming v. New Mexico*.¹¹¹ *Melendez-Diaz v. Massachusetts* held that a certificate of forensic lab results was testimonial, thus the defendant had a right to confront the analyst who tested the evidence.¹¹²

Some revocation proceedings may not require cross-examination of witnesses or confrontation (e.g., whether the defendant paid restitution or failed to report to a probation officer).¹¹³ But when confrontation of a witness is necessary, it helps verify facts that establish violations; it may even help the judge reach a better decision. Not only is reliance on hearsay a problem

may be permissible); *State v. Alderman*, 590 N.E.2d 836, 838 (Ohio Ct. App. 1990) (stating that some Ohio courts have ruled that revocations may not be based on hearsay without showing there was good cause for admitting the hearsay); NEIL P. COHEN, LAW OF PROBATION AND PAROLE § 20:11 n.6 (2d ed. June 2025 Update) (listing fifteen jurisdictions prohibiting revocations based on hearsay alone).

105. COHEN, *supra* note 104, at n.7.

106. *E.g.*, *Nebraska v. Shambley*, 795 N.W.2d 884, 888–90 (Neb. 2011) (reversing the trial court decision to terminate the defendant from drug court program where a witness who wrote a letter could not be cross examined).

107. LAFAVE ET AL., *supra* note 63, § 26.10(d).

108. *See, e.g.*, *Rousseau v. State*, 171 S.W.3d 871, 880 (Tex. Crim. App. 2005) (holding that jail disciplinary reports containing officers’ observations and third-party witness statements were testimonial hearsay); *Grant v. State*, 218 S.W.3d 225, 227–28, 232 (Tex. App.—Houston [14th] 2007, pet. ref’d) (holding that trial court erroneously admitted high school disciplinary records containing subjective narratives of school rule violations); Appellant Inman’s Amended Brief, *supra* note 92 (arguing that probation violation testimony based on absent witnesses’ reports constituted testimonial hearsay).

109. *Rousseau*, 171 S.W.3d 880.

110. *E.g.*, *Grant*, 218 S.W.3d at 227–28, 232; Appellant Inman’s Amended Brief, *supra* note 92 (showing that defense counsel objected to testimony of a mental health coordinator, who testified about statements the defendant made to her probation officer and to a urinalysis report).

111. *Bullcoming v. New Mexico*, 564 U.S. 647, 664 (2011).

112. *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 311 (2009).

113. *See Greer v. State*, 999 S.W.2d 484, 489 (Tex. App.—Houston [14th Dist.] 1999, pet. ref’d).

for the truth-seeking function of the revocation hearing, but it can also deny defendants the opportunity to be rehabilitated, which is the fundamental reason community supervision exists.¹¹⁴

III. FEDERAL AND STATE LAW ON REVOCATION PROCESSES

The Sixth Amendment's Confrontation Clause guarantees defendants the right to confront their accusers.¹¹⁵ The text of the Sixth Amendment reads, "In all criminal prosecutions, the accused shall enjoy the right to . . . be confronted with the witnesses against him."¹¹⁶ The Supreme Court has interpreted "criminal prosecution" to mean a criminal proceeding.¹¹⁷ According to the Court, community supervision revocations are not criminal proceedings.¹¹⁸ Therefore, the Sixth Amendment does not apply to revocation hearings.¹¹⁹

A defendant facing revocation, according to the U.S. Supreme Court, has a more limited right to confrontation under the Due Process Clause.¹²⁰ Federal courts rely on the Due Process Clause housed in the Fifth Amendment, whereas state courts rely on the Fourteenth Amendment's Due Process Clause.¹²¹ This Article focuses on state revocation hearings.

Under the Fourteenth Amendment's Due Process Clause, the government cannot "deprive any person of life, liberty, or property, without due process of law."¹²² The Supreme Court has held that the Due Process Clause encompasses several rights at a revocation hearing: an opportunity to present evidence, a *conditional* right to confront government witnesses, an opportunity to receive a written report of violations (i.e., notice), and the right to have a neutral arbiter sit in judgment.¹²³ Courts emphasize there should be

114. See *Torres v. State*, 617 S.W.3d 95, 101 (Tex. App.—Houston [1st Dist.] 2020, pet. ref'd).

115. U.S. CONST. amend. VI.

116. *Id.* There is debate on what "all," the word that modifies "criminal prosecutions" actually means among both courts and scholars. Sanjay Chhablani, *Disentangling the Sixth Amendment*, 11 U. PA. J. CONST. L. 487, 505–12 (2009).

117. See *Gagnon v. Scarpelli*, 411 U.S. 778, 781 (1973).

118. *Id.* at 782; *Morrissey v. Brewer*, 408 U.S. 471, 480 (1972).

119. See *Morrissey*, 408 U.S. at 480.

120. See *Scarpelli*, 411 U.S. at 781–82; *People v. Turley*, 109 P.3d 1025, 1026 (Colo. App. 2004) ("To the extent probationers have a right of confrontation in probation revocation proceedings, this right flows entirely from the Due Process Clause of the Fourteenth Amendment."); see also *Moody v. Daggett*, 429 U.S. 78, 85–86 (1976) (stating that the parole revocation process has safeguards provided by the Fourteenth Amendment's Due Process Clause).

121. *E.g.*, *Scarpelli*, 411 U.S. at 781–82 (probationers are entitled to a preliminary and final revocation hearing as described in *Morrissey*); *Turley*, 109 P.3d at 1026 (*Crawford* did not alter the rules for probation revocation proceedings); *United States v. Perez*, 526 F.3d 543, 548 (9th Cir. 2008) ("Admission of hearsay evidence in revocation of supervised release proceedings is governed by the Fifth Amendment right to due process.").

122. U.S. CONST. amend. XIV.

123. *Scarpelli*, 411 U.S. at 786.

a process for revocation that meets minimum due process requirements, albeit with lesser rights than those granted at trial.¹²⁴

A. The Supreme Court Cases

The U.S. Supreme Court cases that shaped the revocation hearing span four decades, beginning in the 1930s and ending in the 1970s.¹²⁵ Initially, the Supreme Court opposed hearings that even remotely resembled trials in probation revocation cases, finding no support in the Constitution for them.¹²⁶ In *Escoe v. Zerbst*, the Court reversed the trial court because the judge sentenced the federal probationer without a statutorily required hearing.¹²⁷ The Court deemed the hearing a “legal privilege” founded on grace, not constitutional rights.¹²⁸

Today, scholars debate whether defendants comply with probation conditions due to the looming threat of incarceration, or whether it is a merciful and rehabilitative alternative to incarceration as *Escoe* suggested.¹²⁹ Regardless, probation officers have caseloads that are high and difficult to manage; these caseloads may result in fewer revocation hearings, or hearings for only the most serious violators.¹³⁰

The *Escoe* decision does not include the word “confrontation.”¹³¹ Few cases at that time applied the Sixth Amendment’s Confrontation Clause because it only applied to federal cases.¹³² Most crimes then were prosecuted in states, so the Supreme Court had limited opportunities to interpret or apply the amendment.¹³³ The *Escoe* Court instead held that the probationer had a *statutory* right to appear in front of the judge before sentencing.¹³⁴ The Court acknowledged the dangers of the trial court foregoing a hearing before deciding to revoke probation.¹³⁵

Clearly the end and aim of an appearance before the court must be to enable an accused probationer to explain away the accusation. The charge against

124. See *Morrissey v. Brewer*, 408 U.S. 471, 480 (1972).

125. *Escoe v. Zerbst*, 295 U.S. 490, 492–93 (1935); *Scarpelli*, 411 U.S. at 790; see Esther K. Hong, *Friend or Foe? The Sixth Amendment Confrontation Clause in Post-Conviction Formal Revocation Proceedings*, 66 SMU L. REV. 227, 231 (2013) (noting that the Supreme Court has not issued any major decisions on this issue since *Morrissey* and *Scarpelli*).

126. *Escoe*, 295 U.S. at 492–93.

127. *Id.* at 491–92.

128. *Id.* at 492; see also *Burns v. United States*, 287 U.S. 216, 220 (1932) (“Probation is thus conferred as a privilege, and cannot be demanded as a right. It is a matter of favor, not of contract.”).

129. Fish, *supra* note 2, at 1440–41.

130. See Horwitz, *supra* note 3, at 761 (estimating that in the late 1990s and early 2000s, probation officers in the U.S. supervised 250–350 people).

131. *Escoe*, 295 U.S. at 490.

132. See Chhablani, *supra* note 116, at 492.

133. *Id.* at 492–93.

134. *Escoe*, 295 U.S. at 493.

135. See *id.* at 492–93.

him may have been inspired by rumor or mistake or even down-right malice. He shall have a chance to say his say before the word of his pursuers is received to his undoing. . . . [T]here shall be an inquiry so fitted in its range to the needs of the occasion as to justify the conclusion that discretion has not been abused by the failure of the inquisitor to carry the probe deeper. That much is necessary, or so the Congress must have thought, to protect the individual against malice or oppression.¹³⁶

Escoe mandated a hearing because (1) Congress required it through statute; (2) the probationer must be given an opportunity to defend himself against the allegations; and (3) decisions to revoke and punish must be based on true and reliable evidence.¹³⁷ The *Escoe* opinion never mentioned due process.¹³⁸

More than a decade later, the Court discussed due process in the context of sentencing.¹³⁹ In a 1948 decision, *Townsend v. Burke*, the Supreme Court reviewed a sentencing hearing based on materially false assumptions concerning the defendant's criminal history.¹⁴⁰ Had he been represented by counsel, his attorney could have challenged the misinformation or could have sought a new sentence based on correct information.¹⁴¹ The Court held the irresponsible admission of false information, which formed the foundation of the sentence, amounted to a due process violation.¹⁴² The underlying policy echoes that of *Escoe*: sentencing decisions must be based on true and reliable evidence.¹⁴³

Townsend was not the only sentencing case to invoke the Due Process Clause of the Fourteenth Amendment.¹⁴⁴ In the first half of the twentieth century, the Supreme Court applied the Due Process Clause in a variety of scenarios closely tied to punishment, incarceration, and sentencing.¹⁴⁵ One of these decisions is critical.

In *Williams v. New York*, the judge used testimony the jury, who recommended a life sentence, did not possess when he sentenced the

136. *Id.* at 493–94 (internal citations omitted).

137. *See id.* at 492–93.

138. *Id.*

139. *Townsend v. Burke*, 334 U.S. 736, 741 (1948).

140. *Id.*

141. *Id.* at 740–41.

142. *Id.* at 741.

143. *See Escoe*, 295 U.S. at 492–93.

144. *E.g., In re Oliver*, 333 U.S. 257, 273 (1948) (holding due process applied to a criminal contempt proceeding where judge sentenced defendant without a hearing); *Specht v. Patterson*, 386 U.S. 605, 608 (1967) (holding due process prevented a commitment proceeding where the defendant was not given a formal hearing and had no opportunity to cross examine witnesses); *California v. Green*, 399 U.S. 149, 153, 187 (1970) (Harlan, J., concurring) (discussing that due process is a consideration in a preliminary hearing where the State has no credible evidence to offer against the accused); Chhablani, *supra* note 116, at 493.

145. *See Chhablani, supra* note 116, at 493.

defendant to death in a capital murder case.¹⁴⁶ Williams complained on appeal that he could not confront the witnesses' testimony that swayed the judge.¹⁴⁷ Arguing this denied him due process of law under the Fourteenth Amendment, he relied upon a Supreme Court case that held no person shall be tried and convicted without an opportunity to examine adverse witnesses.¹⁴⁸

The *Williams* Court never addressed the Confrontation Clause.¹⁴⁹ In fact, the Supreme Court would not apply the Confrontation Clause in state cases until 1965.¹⁵⁰ The Warren Court was the first to interpret and apply the various rights found in the Sixth Amendment to criminal cases and procedures.¹⁵¹ However, an expansive reading of the Fourteenth Amendment and the Due Process Clause's application to state proceedings would result in a limited reading of the Sixth Amendment's application to states.¹⁵²

Instead, the *Williams* Court examined the policy reasons behind considering broader categories of evidence at sentencing.¹⁵³ It stated that a detailed probation report with "the fullest information possible concerning the defendant's life and characteristics" is essential to determining an appropriate punishment.¹⁵⁴

Probation workers making reports of their investigations have not been trained to prosecute but to aid offenders. Their reports have been given a high value by conscientious judges who want to sentence persons on the best available information rather than on guesswork and inadequate information. . . . [M]ost of the information now relied upon by judges to guide them in the intelligent imposition of sentences would be unavailable if [] information were restricted to that given in open court by witnesses subject to cross-examination. . . . Such a procedure could endlessly delay criminal administration in a retrial of collateral issues.¹⁵⁵

The *Williams* opinion suggests that probation officers at that time were more gracious to probationers than they are now.¹⁵⁶ According to the *Williams* Court and scholars, community supervision at that time had a true

146. *Williams v. New York*, 337 U.S. 241, 242–43 (1949).

147. *Id.* at 243.

148. *Id.* at 245 (citing *Oliver*, 333 U.S. at 273).

149. *Id.* at 242–52.

150. Note, *An Argument for Confrontation Under the Federal Sentencing Guidelines*, 105 HARV. L. REV. 1880, 1888 n.65 (1992); *Pointer v. Texas*, 380 U.S. 400, 403 (1965) (incorporating the Sixth Amendment to the states through the Due Process Clause of the Fourteenth Amendment).

151. Chhablani, *supra* note 116, at 494.

152. *Id.* at 494–95.

153. *Williams*, 337 U.S. at 246–47.

154. *Id.* at 247.

155. *Id.* at 249–50.

156. *Id.*

rehabilitation function.¹⁵⁷ It is debatable whether that function has shifted to a form of punishment in and of itself, or whether its function still is primarily rehabilitative.¹⁵⁸

Today, the probation officer and probation department have been called an arm of the state by some courts,¹⁵⁹ but most probation officers would probably consider themselves social workers. Nevertheless, the purpose of the probation report is to document condition compliance, as well as condition violations the officer may need to prove in a future motion to revoke hearing.¹⁶⁰ The shift from the time of *Williams* to now may have begun in the 1970s and 1980s when “policymakers abandoned their early ‘welfarist’ ambitions and instead began to emphasize community supervision’s ‘control and risk monitoring’ functions.”¹⁶¹

The *Williams* Court suggested the detailed probation report was informative and removed judicial guesswork and sentences based on incorrect information.¹⁶² Today, defendants raising Confrontation Clause issues claim information in reports is incorrect, they cannot challenge it, and those inaccuracies lead to harsher sentences.¹⁶³ Justice Murphy, who dissented in *Williams*, stated that much of the evidence in *Williams*’s probation report was incompetent and damaging, and *Williams* was unable to scrutinize it.¹⁶⁴ Both the majority and dissent focused on information being accurate, but the majority saw that goal achieved through unbiased investigation and honesty on the part of probation officers, whereas the dissent considered it best achieved through examination.¹⁶⁵ The Framers of

157. *Id.*; Appleman, *supra* note 9, at 1348 (stating that rehabilitation was the goal until the early 1970s); Horwitz, *supra* note 3, at 754 (asserting that the historical purpose of probation was rehabilitation).

158. Horwitz, *supra* note 3, at 762.

159. *E.g.*, *Canchola v. State*, 255 So. 3d 442, 444 (Fla. Dist. Ct. App. 2018) (acknowledging that “a probationer absconds when he removes himself from ‘the controlling arm of the state’ by changing his residence without consent and leaving his probation officer without knowledge of his current whereabouts”). Probation departments have argued they are an arm of the state to avoid civil rights liability in lawsuits; federal courts have agreed with them. *E.g.*, *Clark v. Tarrant Cnty.*, 798 F.2d 736, 745 (5th Cir. 1986) (describing probation as an arm of the state, entitling a state to immunity within the Eleventh Amendment from suits in federal courts brought by citizens of the state).

160. *E.g.*, *Cunningham v. State*, 673 S.W.3d 280, 292 (Tex. App.—Texarkana 2023, no pet.) (questioning from law enforcement would objectively lead a witness to believe the statements would be used in a revocation hearing); *Commonwealth v. Doyle*, 963 N.E.2d 776 (Mass. App. Ct. 2012) (stating that probation officer testimony at revocation hearing and report established technical violations, which included “the defendant’s failure to appear in court, to attend counseling sessions that were a condition of her probation, and to pay ordered probation supervision fees”); Joshua B. Kay, *New Juvenile Discovery Rules Mandatory, Comprehensive, and Streamlined*, 98 MICH. BAR J. 20, 20–21 (2019) (describing new discovery rules that require probation officer reports to be turned over in discovery to the defense team and the prosecutor before the revocation hearing takes place).

161. Schuman I, *supra* note 7, at 1884 (quoting Fiona Doherty, *Obey All Laws and Be Good: Probation and the Meaning of Recidivism*, 104 GEO. L. J. 291, 333 (2016)).

162. *See Williams v. New York*, 337 U.S. 241, 249 (1949).

163. Appleman, *supra* note 9, at 1353, 1365; Horwitz, *supra* note 3, at 755, 765 (judges may incarcerate defendants following a revocation to maintain credibility).

164. *Williams*, 337 U.S. at 253 (Murphy, J. dissenting).

165. *Id.* at 249–50, 253.

the Constitution may have sided with Justice Murphy; they preferred face-to-face confrontation and loathed judicial determinations of evidence reliability.¹⁶⁶

Williams marks the first time the Court applied the Fourteenth Amendment's Due Process Clause in a revocation appeal.¹⁶⁷ Any court decision that suggests *Williams* supports a Sixth Amendment application—namely that the Supreme Court held it did not apply to revocation hearings—is mistaken.¹⁶⁸ *Williams* created a due process right to confront; it never addressed a Sixth Amendment right to confront.¹⁶⁹ This makes sense given the fact that at the time, the Sixth Amendment had not been incorporated to the states, and *Williams* was a state case.¹⁷⁰

More than thirty years later, in *Mempa v. Rhay*, the Supreme Court would decide whether granting defendants' rights in revocation proceedings would overburden state governments.¹⁷¹ In that case, three defendants complained that the State of Washington denied them the right to counsel under the Sixth Amendment in probation revocation hearings.¹⁷² The Supreme Court recognized the right to counsel under the Sixth Amendment attaches "at every stage of a criminal proceeding where substantial rights of a criminal accused may be affected," which includes sentencing.¹⁷³ The Court concluded that whether it is a probation revocation proceeding or a sentencing hearing, defendants maintain a right to counsel.¹⁷⁴ The exercise of this right would not overburden state governments.¹⁷⁵ *Mempa* did not address whether the Confrontation Clause applied to probation revocation hearings, but by holding the right to counsel applied, it implicitly held the hearing was part of the criminal prosecution.¹⁷⁶

The Supreme Court did not consider what a revocation hearing should look like until the 1970s.¹⁷⁷ *Morrissey v. Brewer* addressed rights in a parole revocation setting, which would serve as a blueprint for probation revocations.¹⁷⁸ In *Morrissey*, two parolees violated their conditions.¹⁷⁹ Their parole officers submitted written reports to parole board members, who

166. See Hong, *supra* note 125, at 237–39.

167. *Williams*, 337 U.S. at 250.

168. E.g., *Mitchell v. United States*, 526 U.S. 314, 337 (1999) (erroneously relying on *Williams* for a Sixth Amendment holding).

169. *Williams*, 337 U.S. at 250.

170. Chhablani, *supra* note 116, at 507.

171. *Mempa v. Rhay*, 389 U.S. 128, 137 (1967).

172. *Id.* at 130–33.

173. *Id.* at 134.

174. *Id.* at 137.

175. *Id.*

176. Shaakirrah R. Sanders, *Unbranding Confrontation as Only a Trial Right*, 65 HASTINGS L.J. 1257, 1266 (2014) [hereinafter Sanders I].

177. *Morrissey v. Brewer*, 408 U.S. 471, 472 (1972).

178. *Id.* at 472; *Gagnon v. Scarpelli*, 411 U.S. 778, 782 (1973); *Lassiter v. Dep't of Soc. Servs. of Durham Cnty.*, 452 U.S. 18, 26 (1981) (calling *Morrissey* and *Scarpelli* analogous cases).

179. *Morrissey*, 408 U.S. at 473–74.

revoked their parole and returned them to prison without scheduling a hearing.¹⁸⁰ Both men exhausted state remedies, then filed a writ of habeas corpus in federal court alleging they were denied due process.¹⁸¹

In its review, the Supreme Court explained that the process for revocation has two parts: deciding whether there were parole violations and deciding what to do about them.¹⁸² The Court emphasized it is important to have an accurate representation of facts that depict the severity of the violations because a “returnee may face . . . substantial imprisonment.”¹⁸³ In this way, the *Morrissey* Court recognized that accurate information leads to fairness in sentencing.¹⁸⁴

Parole arises after the conclusion of the prosecution when supervision is no longer the court’s responsibility, but that of an administrative agency (the parole board).¹⁸⁵ Therefore, revocations are administrative in nature, not criminal.¹⁸⁶ The parolee’s liberty is only conditional, but it nevertheless is protected under the Due Process Clause of the Fourteenth Amendment.¹⁸⁷ This due process right requires the parole board to base its decision on verified facts and informed and accurate knowledge of the person’s behavior that led to the hearing.¹⁸⁸

When a parolee violates conditions of release, the State has an interest in a hearing that has some procedural guarantees, but not in duplicating an adversarial trial-like process.¹⁸⁹ Society’s interest lies in making sure the revocation process is fair and based on discretion informed by accurate knowledge of the parolee’s actions.¹⁹⁰ However, the State is interested in expediency.¹⁹¹ The Court weighed the risk of safety to the public, the Government’s need for a non-burdensome hearing, the defendant’s rehabilitation, and the need to base the outcome on verified facts and accurate knowledge of the violations.¹⁹² The first two favor the State whereas the last two favor the defense.¹⁹³

Based on these interests, the Court recommended a two-part process: a preliminary hearing and a revocation hearing.¹⁹⁴ The first process should

180. *Id.*

181. *Id.* at 474.

182. *Id.* at 479–80.

183. *Id.* at 480.

184. *See id.* at 484.

185. *Id.*

186. *Id.* at 475, 478, 480, 486 (repeatedly referring to the parole revocation process as administrative in nature); *Gagnon v. Scarpelli*, 411 U.S. 778, 782 (1973) (holding probation revocation is not part of the criminal proceeding).

187. *See Overton v. Bazzetta*, 539 U.S. 126, 138 (2003) (Stevens, J., concurring).

188. *Morrissey*, 408 U.S. at 484.

189. *Id.* at 483.

190. *Id.* at 484.

191. *See id.* at 483–84, 488.

192. *Id.*

193. *Id.*

194. *Id.* at 485, 487–88.

establish probable cause for the violation and should occur shortly after arrest while information is fresh and witnesses are available.¹⁹⁵ The parolee needs adequate notice, an opportunity to be heard, the ability to provide evidence and information, and on request, an opportunity to question witnesses.¹⁹⁶ When the safety of the witness is at risk, however, the defendant may not confront the witness.¹⁹⁷

The second process, the revocation hearing, would allow the parolee the opportunity to testify and to offer evidence, including mitigating evidence.¹⁹⁸ In the first hearing, there is a conditional right of confrontation; in the second, the right exists unless the hearing officer finds good cause to waive the right of confrontation.¹⁹⁹ Given the limited confrontation “rights” in both phases, the Court appeared to balance the government’s interest in having an effortless procedure more heavily than the probationer’s confrontation interests and rights.²⁰⁰

The Court clarified it was not writing the procedure for all states but determining the minimum requirements of due process.²⁰¹ To that end, the Court identified six requirements: written notice of the violations; discovery; the right to be heard in person and to present evidence; the right to confront adverse witnesses absent good cause; a neutral decisionmaker; and a written statement that indicates the decisionmaker’s ruling and its basis.²⁰² The Court believed this process would create an easy, yet flexible structure for any government to implement.²⁰³ But it also held that because revocations are not part of the “criminal prosecution,” “the full panoply of rights . . . does not apply.”²⁰⁴ In sum, the Sixth Amendment’s Confrontation Clause did not apply to revocation hearings.²⁰⁵

Justice Douglas dissented.²⁰⁶ Concerned that parole officers had already imprisoned the appellants for three years based on their parole officers’ testimonies alone, he raised the possibility that without the chance to challenge the allegations, the basis for their detention could be false.²⁰⁷ He warned that “confrontation . . . may . . . be necessary for a fair hearing and

195. *Id.* at 485.

196. *Id.* at 487.

197. *Id.* at 487.

198. *Id.* at 488.

199. *Id.* at 489.

200. *Id.* at 490 (“The few basic requirements set out above . . . should not impose a great burden on any State’s parole system.”).

201. *Id.* at 488–89.

202. *Id.* at 489.

203. *See id.*

204. *Id.* at 480.

205. *See id.*

206. *Id.* at 491–500 (Douglas, J., dissenting).

207. *Id.* at 495.

the ascertainment of truth. The hearing is to determine the *fact* of parole violation.”²⁰⁸

The process in Iowa, where the two consolidated cases in *Morrissey* arose, concerned Justice Douglas because an Iowan parole officer served as prosecutor and officer.²⁰⁹ Justice Douglas would have removed the parole officer from the hearing, provided due process safeguards—including confrontation rights—and given the parolees freedom until the allegations were proven true.²¹⁰ He also found that because probation and parole were so common, their processes looked less like episodic acts of mercy, as they had in the past, but were instead machine-like systems processing hundreds of thousands of people who needed additional legal safeguards.²¹¹

A year later, in *Gagnon v. Scarpelli*, the Supreme Court addressed probation revocation procedures.²¹² Relying on *Morrissey*, the Court found that probation revocation, like parole revocation, is not a stage of the criminal prosecution but can nevertheless result in the probationer’s loss of liberty.²¹³ A probationer, therefore, is entitled to two hearings: a preliminary hearing where the arbiter determines whether the allegations supporting the violations are true, and a revocation hearing, where the arbiter decides whether to continue or revoke probation.²¹⁴

At the preliminary hearing, a probationer is entitled to notice, the right to be present, the right to admit evidence, the right to an independent decisionmaker, and the right to a record of the hearing.²¹⁵ However, the probationer has only a conditional right to confront adverse witnesses at the preliminary hearing.²¹⁶ The revocation hearing has similar rights, including the right to confront adverse witnesses *unless* the independent decision maker finds “good cause” to deny confrontation.²¹⁷ The court never defined that phrase. States have merely repeated the phrase in their own opinions or have crafted their own definitions.²¹⁸

208. *Id.* at 499 (emphasis added).

209. *Id.* at 499–500.

210. *Id.*

211. *Id.* at 493 n.3.

212. *Gagnon v. Scarpelli*, 411 U.S. 778, 779 (1973).

213. *Id.* at 782 & n.3.

214. *Id.* at 782, 784–85.

215. *Id.* at 786 (citing *Morrissey*, 408 U.S. at 487).

216. *Id.*

217. *Id.*

218. *E.g.*, *Washington v. Smith*, 572 P.3d 469, 481 (Wash. Ct. App. 2025) (“Good cause is defined in terms of ‘difficulty and expense of procuring witnesses in combination with demonstrably reliable or clearly reliable evidence’ . . . [which] ensure[s] that the finding of a violation of a term of a suspended sentence will be based upon verified facts.”) (internal citations omitted); *Calvert v. State*, 310 N.W.2d 185, 188 (Iowa 1981) (leaving the phrase undefined); *Michigan v. Buie*, 817 N.W.2d 33, 48 (2012) (“‘Good cause’ simply means a ‘satisfactory,’ ‘sound or valid’ ‘reason,’ whereas ‘necessary’ means ‘essential’ or ‘indispensable.’ Moreover, under the court rule there is no need to identify a corresponding state interest; any sound reason is sufficient.”).

The *Scarpelli* Court wanted to prevent revocation hearings from turning into trial-like proceedings.²¹⁹ It considered the number of revocations and the cost of adversarial proceedings as the primary reasons to avoid creating a more confrontational process.²²⁰ It did recommend, in the interest of fairness, that states may need to appoint counsel in some revocation proceedings in light of due process concerns.²²¹

It was never the intention of the Supreme Court in *Morrissey*, which led to the *Scarpelli* decision, to set procedural standards for all jurisdictions.²²² In fact, the Court stated, “We cannot write a code of procedure; that is the responsibility of each [s]tate.”²²³ Yet, the next Section of the Article demonstrates states followed the Supreme Court’s lead.

B. Revocation and Confrontation Elsewhere

The Supreme Court recognized in *Morrissey* that states could create their own procedures for revocation proceedings as long as they abided by minimum due process standards.²²⁴ Approaches differ not only procedurally, but also in decisions about which constitutional clauses govern, whether hearsay is admissible, and whether good cause must be established before excusing a witness with knowledge about violations from testifying at the hearing.²²⁵ This Section will examine these differences.²²⁶

States differ in their approaches to the Sixth Amendment’s application to revocation hearings.²²⁷ Some states, like Arkansas, California, Maryland, and Rhode Island, hold the Sixth Amendment’s Confrontation Clause applies, or a state statute conferring confrontation rights to probation revocation proceedings applies.²²⁸ Arkansas has held the Confrontation Clause applies symmetrically from trial to all hearings where punishment is

219. *Scarpelli*, 411 U.S. at 787–88 n.11.

220. *Id.*

221. *Id.* at 790.

222. *Morrissey v. Brewer*, 408 U.S. 471, 488–89 (1972).

223. *Id.* at 488.

224. *Morrissey*, 408 U.S. at 488–89.

225. *E.g.*, *Ryan v. State*, 484 S.W.3d 689, 693 (Ark. Ct. App. 2016) (holding that pursuant to a state statute, the Sixth Amendment right of confrontation does apply to probation revocation hearings); *People v. Liggins*, 266 Cal. Rptr. 3d 777, 784–87 (Cal. Ct. App. 2020) (stating that a balancing test and *Crawford v. Washington* apply to documentary evidence admitted at revocation hearings); *Thompson v. State*, 846 A.2d 477, 481 (Md. Ct. Spec. App. 2004) (finding a right to confrontation in a probation revocation hearing under the Sixth Amendment); *State v. Johnson*, 899 A.2d 478, 481 (R.I. 2006) (applying the Sixth Amendment and state constitution to give a right to confrontation in a probation revocation hearing).

226. *See infra* notes 233–367 (discussing the differences in state approaches to confrontation at revocation proceedings).

227. *See infra* notes 248–67 (noting differences in the way states apply the Sixth Amendment to revocation proceedings).

228. *See infra* notes 248–67 (explaining how revocation proceedings differ among states).

concerned.²²⁹ Alaska, Florida, Georgia, Indiana, and Virginia have held it does not.²³⁰ In Nebraska, those on community supervision have a due process right to cross examine adverse witnesses who have first-hand knowledge of violations.²³¹

There have been a variety of approaches to hearsay.²³² Connecticut requires the hearsay statement to be reliable *and* corroborated.²³³ Nevada has created a balancing test that must be met before admitting hearsay in a revocation hearing.²³⁴ Georgia, Illinois, Pennsylvania, and Vermont have flatly ruled that the unreliability of hearsay evidence renders it inadmissible at probation revocation hearings.²³⁵ Several states, including Alabama, Delaware, Florida, Illinois, Massachusetts, North Carolina, Ohio, and Wyoming, require a probation violation be supported by more than hearsay alone.²³⁶

229. *Vankirk v. State*, 385 S.W.3d 144, 151 (Ark. 2011); Dustin K. Doty, *Saving Face: Arkansas's Application of the Confrontation Clause to Jury Sentencing Proceedings*, 66 ARK. L. REV. 549, 563 (2013).

230. *See, e.g.,* *McDaniels v. State*, 451 P.3d 403, 405 (Alaska Ct. App. 2019) (reasoning that the Confrontation Clause does not apply to a probation revocation hearing because it only applies to criminal prosecutions); *Peters v. State*, 984 So. 2d 1227, 1229 (Fla. 2008) (finding that the *Crawford* decision only applies to criminal prosecutions, which a revocation hearing is not); *Grimes v. State*, 875 S.E.2d 500, 503 (Ga. Ct. App. 2022) (holding that the Confrontation Clause is not implicated in a probation revocation hearing); *Knecht v. State*, 85 N.E.3d 829, 833 (Ind. Ct. App. 2017) (finding that the rights the Confrontation Clause provides are not as extensive in probation revocation hearings as they are in criminal trials); *Johnson v. Commonwealth*, 819 S.E.2d 425, 430 (Va. 2018) (stating that the Sixth Amendment Confrontation Clause only applies to criminal trials and not probation revocation hearings).

231. *Nebraska v. Shambley*, 795 N.W.2d 884, 895 (Neb. 2011).

232. *See, e.g.,* *State v. Maietta*, 134 A.3d 572, 580 (Conn. 2016) (reasoning that hearsay is reliable when it is corroborated); *Anaya v. State*, 606 P.2d 156, 158 (Nev. 1980) (employing a balancing test to determine the admissibility of hearsay); *Goodson v. State*, 444 S.E.2d 603, 603 (Ga. Ct. App. 1994) (holding that hearsay evidence has no probative value in a probation revocation hearing); *Sams v. State*, 48 So. 3d 665, 668 (Ala. 2010) (finding that hearsay cannot be the only evidence at a probation revocation hearing).

233. *See Maietta*, 134 A.3d at 580.

234. *See Anaya*, 606 P.2d at 158.

235. *E.g.,* *Goodson*, 444 S.E.2d at 603 (“Hearsay evidence has no probative value in a probation revocation hearing.”); *In re N.W.*, 688 N.E.2d 855, 859 (Ill. App. Ct. 1997) (concluding that hearsay is not competent evidence); *State v. Eldert*, 125 A.3d 139, 148 (Vt. 2015) (reasoning that hearsay must be shown to be reliable before being admitted at probation revocation hearings); *Commonwealth v. Riley*, 384 A.2d 1333, 1337 (Pa. Super. Ct. 1978) (holding that the lower court depended on inadmissible hearsay).

236. *E.g.,* *Sams*, 48 So. 3d at 668 (finding that hearsay must be supported by other evidence at a probation revocation hearing); *Collins v. State*, 897 A.2d 159, 160–61 (Del. 2006) (“[P]robation cannot be revoked solely upon the basis of testimony of a witness with ‘no first-hand knowledge of the events constituting the violations.’”) (quoting *Simmons v. State*, 870 A.2d 132 (Del. 2001)); *Laing v. State*, 200 So. 3d 166, 168 (Fla. Dist. Ct. App. 2016) (holding that probation revocation cannot be based solely on hearsay); *State v. Lewis*, 329 N.E.2d 390, 393 (Ill. Ct. App. 1975) (holding that hearsay does not establish a fact); *State v. Allen*, 624 S.E.2d 431 (N.C. Ct. App. 2006) (stating that hearsay evidence alone cannot be the sole basis to revoke probation); *State v. Alderman*, 590 N.E.2d 836, 838 (Ohio Ct. App. 1990) (determining that due process rights were violated when the probation officer who wrote the report lacked good cause not to testify, and another officer did); *Anderson v. State*, 43 P.3d 108, 120 (Wyo. 2002) (stating that probation revocation may not be based solely on the use of hearsay).

Some states have a more nuanced approach to hearsay admissibility.²³⁷ Courts in Maryland, Virginia, and California have attempted to thoughtfully balance the interests of both parties, and the specific characteristics and circumstances surrounding the hearsay evidence used in each case.²³⁸ A Massachusetts court emphasized hearsay must be reliable, which often means it must fit into an exception.²³⁹ When courts carefully consider these things, they may find the hearsay evidence unreliable and the defendant's rights to confrontation (even under the lesser due process standard) have been violated.²⁴⁰ But this is a harder path for defendants to navigate successfully.²⁴¹

Courts differ on their approaches to good cause determinations.²⁴² In some jurisdictions, like Wyoming, when a court determines that hearsay evidence is trustworthy, it considers whether the State has satisfied the good cause standard.²⁴³ Pennsylvania requires judges to analyze good cause; it reverses judges who do not.²⁴⁴ Several jurisdictions allow hearsay evidence without requiring the Government to show good cause that the declarant is unavailable.²⁴⁵ Still others, like Arkansas and Vermont, require the government to show good cause, require the court to balance interests, *and* find the evidence reliable before admitting hearsay.²⁴⁶ Appellate courts have reversed trial courts who failed to require prosecutors show good cause before admitting and considering hearsay evidence.²⁴⁷

237. *E.g.*, *Blanks v. State*, 137 A.3d 1074, 1088–89 (Md. Ct. Spec. App. 2016) (determining that a defendant's interest in confronting an accuser is dependent on the role or identity of the accuser); *People v. Gray*, 533 P.3d 519, 528 (Cal. 2023) (applying a balancing test to determine whether defendant should be able to confront their accuser); *Henderson v. Commonwealth*, 722 S.E.2d 275, 279–89 (Va. Ct. App. 2012), *aff'd*, 736 S.E.2d 901 (Va. 2013) (describing the reliability and balancing tests to determine whether to admit hearsay).

238. *See cases cited supra* note 237 (listing cases from Maryland, Virginia, and California).

239. *E.g.*, *Commonwealth v. Negron*, 808 N.E.2d 294, 299 (Mass. 2004) (determining that hearsay may be admissible if it satisfies the good cause requirement); *State v. Pompey*, 934 A.2d 210, 214 (R.I. 2007) (holding that excited utterance was reliable hearsay thus admissible at probation revocation hearing).

240. *E.g.*, *United States v. Sutton*, 916 F.3d 1134, 1139–41 (8th Cir. 2019) (carefully weighing all interests and the details of the testimony to hold hearsay was admitted in error and defendant's rights to confrontation were violated).

241. *See id.*

242. *E.g.*, *Robinson v. State*, 378 P.3d 599, 610 (Wyo. 2016) (determining that reliability constitutes good cause); *Commonwealth v. Davis*, 336 A.2d 616, 624 (Pa. Super. Ct. 1975) (holding that judges must determine whether there is good cause to admit hearsay).

243. *See Robinson*, 378 P.3d at 610.

244. *See Davis*, 336 A.2d at 624.

245. *E.g.*, *Prellwitz v. Berg*, 578 F.2d 190, 192 (7th Cir. 1978) (probation report was a "conventional substitute for live testimony").

246. *E.g.*, *U.S. v. Black Bear*, 542 F.3d 249, 255 (8th Cir. 2008) (requiring the court to conduct a balancing test of the defendant's constitutional rights and the Government's interests); *Tyler v. State*, 616 S.W.3d 663, 666 (Ark. Ct. App. 2021) (discussing the court's good cause and balancing analysis in revocation proceedings); *State v. Eldert*, 125 A.3d 139, 148 (Vt. 2015) (reversing the trial court's decision based on State's failure to establish good cause).

247. *E.g.*, *United States v. Sutton*, 916 F.3d 1134, 1139 (8th Cir. 2019) (deciding that trial court's decision to consider hearsay lacking as it did not consider good cause and appellate court's analysis of good cause demonstrated there was none).

Other states have split on the issue. In *People v. Gray*, the California Supreme Court resolved a split in the state's intermediate appellate courts.²⁴⁸ Gray's original criminal case was dismissed because it was based on hearsay; however, that hearsay was used as evidence to support the judge's decision to revoke his probation.²⁴⁹ Gray claimed the judge violated his Sixth Amendment confrontation rights.²⁵⁰ The intermediate appellate court held that because the testimonial hearsay fell under an exception, Gray was given due process.²⁵¹

On appeal, the California Supreme Court rejected a categorical approach to these hearings, suggesting that due process is flexible in nature.²⁵² It asked that courts consider several factors when weighing the defendant's confrontation rights against governmental interests.²⁵³ Three factors weigh in favor of the defendant's right to confront: the hearsay is significant to the factual determination being made; corroborating evidence is lacking; and the hearsay is the sole evidence of the violation.²⁵⁴ These factors can overcome the defendant's right to confront the witness: "[b]y the government's substantial showing of good cause for not making the witness available at the revocation hearing, by sufficient independent evidence corroborating the hearsay evidence, and by other indicia of reliability including the fact that the statements fall within a firmly rooted exception to the hearsay rule."²⁵⁵ In the end, the Court reversed Gray's case and requested that the intermediate appellate court weigh these factors.²⁵⁶ California's factors test allows defendants to argue for a more thoughtful and case-specific approach to the admissibility of hearsay evidence.²⁵⁷

States are not in agreement about which clause applies, proper procedures for revocations, and approaches to the admissibility of hearsay at these hearings.²⁵⁸ This is beyond the scope of this Article, but there are four federal tests used to balance the rights of the revoked person with the interests of the government.²⁵⁹ There are even more in the states.²⁶⁰ These varying approaches may signal the traditional legal laboratory that exists in the fifty

248. *People v. Gray*, 533 P.3d 519, 523 (Cal. 2023).

249. *Id.* at 522–23.

250. *Id.*

251. *Id.* at 523.

252. *Id.* at 528.

253. *Id.*

254. *Id.*

255. *Id.* at 531.

256. *Id.*

257. *Id.*

258. *E.g.*, *Reyes v. State*, 868 N.E.2d 438, 441 (Ind. 2007) (stating there are "two principal approaches to evaluating hearsay evidence in probation revocation hearings" across the country); *Hampton v. State*, 203 P.3d 179, 184 (Okla. Crim. App. 2009) (recognizing nonconformity with procedures).

259. *Hong*, *supra* note 125, at 245–48.

260. *Id.* at 241–45.

states. It may also signal the need to rethink the process and the impact the Supreme Court has had, unintentionally or not, on probation revocations.

IV. THE TEXAS REVOCATION DECISIONS

Morrissey and *Scarpelli* shaped the probation revocation process in Texas until 2012 when the Texas Court of Criminal Appeals recognized the process described in both cases looked nothing like Texas's probation revocation procedure.²⁶¹ Texas's legal parroting of U.S. Supreme Court cases, which still exists on some level, is called "lockstepping" in academic circles: it occurs when one jurisdiction follows the Supreme Court's lead even when it does not conform with that jurisdiction's existing legal framework on the issue.²⁶² To understand the significant problems in applying Iowa's process in *Morrissey* and Wisconsin's process in *Scarpelli*'s to Texas, one must examine Texas procedural law and cases that date back to the 1970s.²⁶³

Several appellate courts in Texas have agreed with the U.S. Supreme Court that a probation revocation proceeding is not part of the criminal prosecution but is instead an administrative proceeding.²⁶⁴ They have held that the rights associated with these hearings fall under the Due Process Clause, not the Confrontation Clause, so there is no guaranteed right to confront adverse witnesses.²⁶⁵ However, Texas courts once viewed this issue differently.²⁶⁶

Early Texas cases barred hearsay in revocation proceedings. Around the time the Court decided *Morrissey* and *Scarpelli*, Texas issued several opinions that protected probationers from inadmissible hearsay. In 1973, the Texas Court of Criminal Appeals considered hearsay inadmissible in a

261. *Ex parte Doan*, 369 S.W.3d 205, 209–13 (Tex. Crim. App. 2012).

262. *E.g.*, Nathaniel C. Sutton, *Lockstepping Through Stop-and-Frisk: A Call to Independently Assess Terry v. Ohio Under State Law*, 107 VA. L. REV. 639, 680 (2021) (describing state lockstepping with the Supreme Court's stop-and-frisk laws and policies); Robert F. Williams, *State Courts Adopting Federal Constitutional Doctrine: Case-by-Case Adoptionism or Prospective Lockstepping?*, 46 WM. & MARY L. REV. 1499, 1502 (2005) (describing the phenomenon more broadly).

263. *Smart v. State*, 153 S.W.3d 118, 121 (Tex. App.—Beaumont 2005, pet. ref'd); *Trevino v. State*, 218 S.W.3d 234, 239 (Tex. App.—Houston [14th Dist.] 2007, no pet.); *Mauro v. State*, 235 S.W.3d 374, 375–76 (Tex. App.—Eastland 2007, pet. ref'd); *Wisser v. State*, 350 S.W.3d 161, 164 (Tex. App.—San Antonio 2011, no pet.); *Olabode v. State*, 575 S.W.3d 878, 881 (Tex. App.—Dallas 2019, pet. ref'd).

264. *E.g.*, *Smart*, 153 S.W.3d at 120 (stating community supervision revocation hearing is administrative in nature); *Trevino*, 218 S.W.3d at 239 (agreeing with federal courts that a probation revocation hearing is not part of criminal prosecution); *Mauro*, 235 S.W.3d at 376 (holding Confrontation Clause does not apply because probation hearing is not a stage of criminal prosecution); *Wisser*, 350 S.W.3d at 164 (holding Sixth Amendment does not apply because revocation hearings are not criminal prosecutions); *Olabode*, 575 S.W.3d at 881–82 (explaining both typical probation and deferred adjudication probation are not criminal prosecution stages).

265. *Diaz v. State*, 172 S.W.3d 668, 669 (Tex. App.—San Antonio 2005, no pet.); *Mauro*, 235 S.W.3d at 375–76; *Trevino*, 218 S.W.3d at 239; *Smart*, 153 S.W.3d at 121.

266. *See Johnson v. State*, 498 S.W.2d 198, 200–201 (Tex. Crim. App. 1973); *Maden v. State*, 542 S.W.2d 189, 192 (Tex. Crim. App. 1976).

probation revocation hearing.²⁶⁷ In 1976, the Court determined that uncorroborated and inadmissible hearsay could not support a judge's decision to revoke probation.²⁶⁸ Three years later, it held that testimony from a probation officer who had no actual knowledge of the alleged violation was inadmissible hearsay that could not support the revocation.²⁶⁹ That same year, the Court cautioned trial judges not to revoke probations on hearsay alone.²⁷⁰ None of these cases have been overruled, even though recent opinions contradict these holdings.²⁷¹

Texas courts also discounted the Supreme Court's 1970s cases.²⁷² Just a few months after the Supreme Court decided *Scarpelli*, in *Ex parte Shivers*, the Texas Court of Criminal Appeals boldly stated, "We do not agree that *Scarpelli* is applicable to Texas probation revocation proceedings."²⁷³ The Court reasoned that the probation revocation hearing was a criminal proceeding for two reasons. First, probation is granted when the judge suspends the sentence. Second, a judge must revoke and then sentence the defendant, so the revocation comes before the sentence and the end of the criminal prosecution.²⁷⁴

Before and after *Ex parte Shivers*, judges on the Texas Court of Criminal Appeals in four separate cases recognized that probation revocation looked nothing like the process described in Supreme Court cases.²⁷⁵ Several judges and decisions found that probation revocation was indeed part of the criminal prosecution in Texas.²⁷⁶ This may stem from the fact that Texas, as well as

267. *Johnson*, 498 S.W.2d at 200–01.

268. *Maden*, 542 S.W.2d at 192.

269. *Frazier v. State*, 600 S.W.2d 271, 272 (Tex. Crim. App. 1979).

270. *Long v. State*, 590 S.W.2d 138, 139 (Tex. Crim. App. 1979).

271. *E.g.*, *Baker v. State*, No-2-02-391-CR, 2003 WL 21101725, at *2 (Tex. App.—Fort Worth May 15, 2003, pet. ref'd) (mem. op., not designated for publication) (distinguishing and refusing to follow *Long*).

272. *E.g.*, *Ex parte Shivers*, 501 S.W.2d 898, 900 (Tex. Crim. App. 1973) (refusing to apply *Scarpelli* to Texas revocation hearings).

273. *Id.*

274. *Id.*

275. *E.g.*, *Parker v. State*, 545 S.W.2d 151, 155 (Tex. Crim. App. 1977) (discussing a defendant's right to counsel in revocation hearings because such hearings are similar to criminal prosecutions); *Whisenant v. State*, 557 S.W.2d 102, 103 (Tex. Crim. App. 1977) (labelling the procedures in *Morrissey* and *Scarpelli* as vastly different than the procedures in Texas); *Fariss v. Tipps*, 463 S.W.2d 176, 179 (Tex. 1971), *set aside on other grounds*, No. B-2350, 1971 WL 127076 (Tex. Apr. 19, 1971) (explaining that the definition of a "criminal prosecution" includes revocation proceedings); *Crawford v. State*, 435 S.W.2d 148, 151 (Tex. Crim. App. 1968) (Onion, J., dissenting) (arguing that probationers should have assistance of counsel at revocation hearings since such hearings are an important stage of the criminal process).

276. *E.g.*, *Parker*, 545 S.W.2d at 155 (holding that revocation hearings are criminal prosecutions, and the defendant has the right to assistance of counsel under the Sixth Amendment); *Fariss*, 463 S.W.2d at 179 (holding that revocation hearings are criminal prosecutions under the Texas Constitution); *Crawford*, 435 S.W.2d at 151 (Onion, J., dissenting) (arguing that revocation hearings are an integral part of the criminal process in Texas).

other states, grants more rights to criminal defendants than the federal government does, and has a traditional of more adversarial hearings.²⁷⁷

A. An Adversarial Process

Revocation hearings in Texas are uniquely adversarial.²⁷⁸ A prosecutor represents the State.²⁷⁹ That prosecutor pleads and proves an act (a violation of a condition of probation) just as she would a crime or proving elements at trial.²⁸⁰ The defendant has a right to an attorney and to an appeal.²⁸¹

The same procedural rules in trials apply to revocation hearings.²⁸² Both substantively share all the same procedures.²⁸³ The revocation decision is not administrative, but instead is before the presiding judge of the court who has jurisdiction over the defendant-probationer, the same judge who took the plea or observed the trial, and sentenced the defendant to probation.²⁸⁴ This has been the practice for decades in Texas, dating back to *Scarpelli*.²⁸⁵ This is the case not just in Texas, but elsewhere.²⁸⁶ In Texas, there is no preliminary hearing, just a single revocation hearing before the trial judge.²⁸⁷ So the two-part hearing created for Iowa (*Morrissey*)²⁸⁸ and Wisconsin (*Scarpelli*)²⁸⁹ does not exist in Texas and never has.²⁹⁰ Attorneys must follow the Texas Rules of Evidence in these hearings; defendants can enforce the evidentiary exclusionary rule.²⁹¹ The only difference between a trial and a revocation is the burden of proof is a preponderance of the evidence, not beyond a reasonable doubt.²⁹² One scholar reasoned this lesser burden of proof exists

277. *E.g.*, Adam M. Gershowitz, *Is Texas Tough on Crime but Soft on Criminal Procedure?*, 49 AM. CRIM. L. REV. 31, 44–65 (2012) (highlighting Texas’s higher bar on illegally seized evidence, expansive exclusionary rule, narrow good faith exception, restrictions on the admission of confessions, as well as other procedural safeguards the state imposes).

278. *E.g.*, Euler v. State, 218 S.W.3d 88, 89 (Tex. Crim. App. 2007) (demonstrating that some revocation hearing records on appeal look very trial-like, with the State offering evidence and the defense offering evidence).

279. *See Ex parte Doan*, 369 S.W.3d 205, 210.

280. *Id.* at 212.

281. *Id.* at 210; *see also* Gardner v. Florida, 430 U.S. 349, 358 (1977) (holding that defendant has the right to an attorney at sentencing, as it is a critical stage of the criminal proceeding).

282. *Doan*, 369 S.W.3d at 210.

283. *Whisenant v. State*, 557 S.W.2d 102, 104 (Tex. Crim. App. 1977).

284. *Doan*, 369 S.W.3d at 209–10; Appellant Inman’s Amended Brief, *supra* note 92, at *2, 12 (presiding judge listed under parties was the same judge who found condition); *Whisenant*, 557 S.W.2d at 103, 105 (“[T]he judge at the revocation hearing was the same judge who had granted probation.”).

285. *Whisenant*, 557 S.W.2d at 104.

286. LAFAYE ET AL., *supra* note 63, § 26.10(a) at n.47.

287. *Doan*, 369 S.W.3d at 209–10.

288. *Morrissey v. Brewer*, 408 U.S. 471, 488 (1972).

289. *Gagnon v. Scarpelli*, 411 U.S. 778, 784–85 (1973).

290. *Ex parte Shivers*, 501 S.W.2d 898, 900 (Tex. Crim. App. 1973).

291. *Doan*, 369 S.W.3d at 210.

292. *Id.*

“because only the conscience of the court must be satisfied.”²⁹³ The judge alone—the one who placed the conditions that the defendant is charged with violating—is the one who must decide the consequence for the violations.²⁹⁴ Aside from this different burden, the process looks like the punishment phase of trial in Texas, where parties admit evidence, witnesses testify, the attorneys argue, and the factfinder decides punishment.²⁹⁵

B. The Court of Criminal Appeals Questions Process

A significant case in 2012 decided by the Texas Court of Criminal Appeals raised concerns—for the first time—about *Scarpelli’s* and *Morrissey’s* application to Texas.²⁹⁶ In *Ex parte Doan*, the prosecutor called a probation officer as the sole witness to testify at the defendant’s revocation hearing.²⁹⁷ The judge sustained Doan’s objection to the testimony as hearsay and denied the State’s motion to revoke.²⁹⁸

On appeal following his new criminal conviction, Doan argued, in a res judicata claim, the State is the same party with the same interests in both the new criminal case and the revocation case, which is itself premised on the new law violation.²⁹⁹ To be clear, the Court was not called upon to address whether the Sixth Amendment applied to probation revocation cases.³⁰⁰ However, the case still spoke to that issue indirectly.³⁰¹

The Court began by recognizing Texas judicial confusion about revocation hearings.³⁰² Citing *Hill v. State*,³⁰³ decided in the same year as *Morrissey*, the *Doan* Court stated that Texas had long considered revocation hearings administrative in nature.³⁰⁴ However, the Court determined the Texas “administrative” label arose when Texas courts followed federal decisions using that label.³⁰⁵ To prove this point, the Court cited circuit court

293. Piar, *supra* note 12, at 162; *see also* Horwitz, *supra* note 3, at 771 (“The outcome is that the prosecution gets the sentence it was seeking on the new charge without the burden of ever having to prove it.”).

294. Horwitz, *supra* note 3, at 771.

295. *Doan*, 369 S.W.3d at 212; *see also* Stephen A. Simon, *Re-Imprisonment Without a Jury Trial: Supervised Release and the Problem of Second-Class Status*, 69 CLEV. ST. L. REV. 569, 572, 587 (2021) (addressing, in the federal supervised release context, which is similar to state probation, that “the commonly repeated justifications for the diminished rights available at revocation hearings fall apart” once the punishment following revocation is labeled a new punishment).

296. *Doan*, 369 S.W.3d at 209–210.

297. *Id.* at 206.

298. *Id.*

299. *Id.* at 207, 212–13.

300. *Id.* at 205, 211–12.

301. *See id.* at 205, 209–10.

302. *Id.* at 208.

303. *Hill v. State*, 480 S.W.2d 200, 202–203 (Tex. Crim. App. 1972).

304. *Doan*, 369 S.W.3d at 208.

305. *Id.* at 208–209. The confusion has continued beyond *Doan*. *See Alvarez v. State*, No. 11-13-00322-CR, 2015 WL 6121359, at *3 (Tex. App.—Eastland Oct. 15, 2015, no pet.) (mem. op., not designated for publication) (explaining that because the defendant raised an objection based upon the

cases, *Morrissey*, and *Scarpelli* as the basis for judicial confusion in Texas.³⁰⁶ The Court explained:

Hill was decided at a period of time in which the federal Supreme Court was establishing constitutional due process standards for parolees and those on community supervision. Because the procedure for revoking community supervision in Texas is *unusually judicial and adversarial*, it was not obvious how the Texas community supervision system fit into the federal regime.³⁰⁷

In *Doan*, the Court of Criminal Appeals held for the first time that a revocation hearing in Texas is not at all administrative, nor does it remotely resemble the procedure the Supreme Court described in *Scarpelli*.³⁰⁸ For instance, Texas never adopted the two-part process the Supreme Court described, and yet the Supreme Court found no due process violation with Texas's revocation process in a 1980 case.³⁰⁹ Moreover, unlike the administrative agency process described in *Scarpelli*, the revocation system in Texas happens in courts before judges.³¹⁰ The *Doan* Court then went on to describe a very adversarial revocation process, one that looks nothing like those described by the federal courts.³¹¹

Based upon this recognition, the Court labeled Texas revocation hearings *judicial proceedings* rather than administrative hearings.³¹² The word "confrontation" does not appear in the opinion; the Court only referenced "due process" a few times.³¹³ This new label put Texas courts and judges in an awkward position.³¹⁴

Was it permissible to continue relying on Supreme Court precedent?³¹⁵ Would Texas create an entirely new line of cases based on its unusually adversarial proceeding?³¹⁶ What were courts to do the next time a probationer appealed his case following a revocation hearing?³¹⁷ And what did labeling

Texas Constitution and the U.S. Constitution, but did not cite to a specific Texas constitutional provision, the Court would analyze his confrontation complaint under federal law standards).

306. *Doan*, 369 S.W.3d at 208–209.

307. *Id.* at 209 (emphasis added).

308. *See id.* at 212.

309. *Id.* at 209; *Vincent v. Texas*, 449 U.S. 199, 199 (1980).

310. *Doan*, 369 S.W.3d at 209–10.

311. *Id.* at 210.

312. *See id.*

313. *Id.* at 209.

314. *E.g.*, *Bacilio v. State*, No. 08-14-00096-CR, 2016 WL 1253420, at *3 (Tex. App.—El Paso Mar. 30, 2016, pet. ref'd) (not designated for publication) (discussing the issues the *Doan* decision created).

315. *See Doan*, 369 S.W.3d at 209–210.

316. *See id.* at 209.

317. *See generally* *Guillory v. State*, 652 S.W.3d 923, 927 (Tex. App.—Eastland 2022, pet. ref'd) (contending that *Doan* did not hold that revocation proceedings are part of the criminal prosecution); *Taylor v. State*, No. 09-19-00171-CR, 2020 WL 6472684, at *4 (Tex. App.—Beaumont Nov. 4, 2020, no pet.) (mem. op., not designated for publication) (same).

it a “judicial proceeding” mean for constitutional purposes without any equivalent label elsewhere?³¹⁸ The El Paso Court of Appeals stated that though *Doan* “did not address . . . whether a probationer has a right to confront witnesses in a revocation proceeding . . . it certainly undercut[] the rationale [of earlier] supporting . . . decisions.”³¹⁹

C. The Texas Split

Attorneys and courts in Texas have debated whether the *Doan* Court held revocation hearings are criminal proceedings or whether it stopped short of that.³²⁰ Courts have refuted *Doan*’s importance or ignored the decision altogether; these courts continue to label revocation hearings administrative in nature.³²¹ Several courts, relying on *Doan*, granted defendants the right to confront witnesses at revocation hearings.³²² This Section examines those confrontation-friendly cases more closely.³²³

A few intermediate appellate courts have labeled evidence used at probation revocation hearings as inadmissible hearsay that violated the

318. See Simon, *supra* note 295.

319. *Bacilio*, 2016 WL 1253420, at *7.

320. *E.g.*, *Guillory*, 652 S.W.3d at 927 (asserting that *Doan* did not hold revocation hearings are part of the criminal prosecution); *Taylor*, 2020 WL 6472684, at *6 (contending that *Doan* did not hold revocation hearings are part of the criminal prosecution); see *Hughes v. State*, 651 S.W.3d 461, 467 (Tex. App.—Houston [14th Dist.] 2022) (stating it was not bound to follow post-*Doan* cases that ignored the high court ruling), *aff’d*, 691 S.W.3d 504 (Tex. Crim App. 2024).

321. *E.g.*, *Alvarez v. State*, No. 11-13-00322-CR, 2015 WL 6121359, at *3 (Tex. App.—Eastland Oct. 15, 2015, no pet.) (mem. op., not designated for publication) (refusing revocation hearings as a stage of criminal prosecution); *Roberts v. State*, No. 05-16-00338-CR, 2017 WL 461354, at *2 (Tex. App.—Dallas Jan. 24, 2017, pet. ref’d, untimely filed) (mem. op., not designated for publication) (undercutting *Doan*); *Pickins v. State*, No. 02-17-00050-CR, 2018 WL 3468359, at *4 (Tex. App.—Fort Worth July 19, 2018, no pet.) (mem. op., not designated for publication) (undercutting *Doan*); *Olabode v. State*, 575 S.W.3d 878, 881–82. (Tex. App.—Dallas 2019, pet. ref’d) (holding revocations are not part of criminal prosecutions); *Sabella v. State*, 578 S.W.3d 137, 142 (Tex. App.—Texarkana 2019, no pet.) (holding no case post-*Doan* finds Confrontation Clause applies to revocation hearings); *Corona v. State*, No. 14-17-00821-CR, 2019 WL 1768598, at *3 (Tex. App.—Houston [14th Dist.] Apr. 23, 2019, no pet.) (mem. op., not designated for publication) (stating revocation hearings are not a part of criminal proceedings); *Anthony v. State*, No. 03-17-000327-CR, 2019 WL 639492, at *3 (Tex. App.—Austin Feb. 15, 2019, pet. ref’d) (mem. op., not designated for publication) (holding revocation hearings are not a stage of criminal prosecution); *Hodges v. State*, No. 04-19-00382-CR, 2020 WL 1930485, at *2 (Tex. App.—San Antonio Apr. 22, 2020, no pet.) (mem. op., not designated for publication) (relying on pre-*Doan* case in holding that revocation hearings “are primarily governed by civil standards”); *Inman v. State*, No. 13-20-00349-CR, 2022 WL 709832, at *3 (Tex. App.—Corpus Christi–Edinburg Mar. 10, 2022) (holding post-conviction proceedings are not part of criminal prosecutions), *pet. dismiss’d, improvidently granted*, No. PD-0251-22, 2023 WL 3495573 (Tex. Crim App. May 17, 2023) (per curiam).

322. *E.g.*, *Cunningham v. State*, 673 S.W.3d 280, 292 (Tex. App.—Texarkana 2023, no pet.) (entitling defendant to confront); *Hughes*, 651 S.W.3d at 468 (holding due process safeguards apply at revocation hearings); *Perez v. State*, No. 13-14-00300-CR, 2015 WL 4234236, at *1 n.2 (Tex. App.—Corpus Christi–Edinburg July 9, 2015, no pet.) (mem. op., not designated for publication) (analyzing the Confrontation Clause to revocation proceedings).

323. See *infra* text accompanying notes 334–73 (discussing Texas cases that implicated the Confrontation Clause).

Confrontation Clause.³²⁴ For example, Houston’s First Court of Appeals held that a defendant could raise a Sixth Amendment Confrontation Clause objection to inadmissible hearsay found in business records the State sought to admit.³²⁵ The El Paso Court of Appeals assumed without deciding that probationers can raise Sixth Amendment Confrontation Clause objections in revocation hearings.³²⁶ Houston’s Fourteenth Court of Appeals found the defendant had a Sixth Amendment right to confront witnesses after he was kept from attending his hearing because he had been exposed to COVID-19 in jail.³²⁷ The Corpus Christi–Edinburg appellate court ruled that a lab director, who testified about lab results he did not test or verify, offered inappropriate “surrogate testimony” in violation of the Sixth Amendment and landmark U.S. Supreme Court cases that established Confrontation Clause rights at trial.³²⁸ All of these decisions were handed down after *Doan*.³²⁹

In 2023, the Court of Criminal Appeals had the opportunity to weigh in on the split.³³⁰ After granting petition for discretionary review to hear *Inman v. State*, the Court issued an unpublished decision stating it had improvidently granted petition for discretionary review.³³¹ Four judges suggested in a concurrence that while *Inman* raised Confrontation Clause issues, she failed to preserve error properly and should have raised a due process issue as well.³³² The four dissenting judges, on the other hand, stated the Court initially granted review to resolve the intermediate appellate court split; to abandon review, therefore, was a mistake.³³³

Just after the high court disposed of *Inman*, the Texarkana Court of Appeals issued a thoughtfully reasoned and articulate opinion on the issue.³³⁴ In *Cunningham v. State*, the defendant’s probation officer’s supervisor, who had no personal knowledge of the alleged probation violations, testified at the revocation hearing.³³⁵ The supervisor’s testimony was based upon the assigned probation officer’s notes and a urine analysis, which indicated *Cunningham* used drugs.³³⁶ *Cunningham* called an expert witness to testify

324. See, e.g., *Blackman v. State*, No. 01-12-00525-CR, 2014 WL 50804, at *3 (Tex. App.—Houston [1st Dist.] Jan. 7, 2014, pet. ref’d) (mem. op., not designated for publication) (assuming parties can raise Confrontation Clause objections in revocation hearings); *Bacilio*, 2016 WL 1253420, at *3 (same).

325. *Blackman*, 2014 WL 50804, at *3.

326. *Bacilio*, 2016 WL 1253420, at *3.

327. *Hughes*, 651 S.W.3d at 464, 470–71.

328. *Perez v. State*, No. 13-14-00300-CR, 2015 WL 4234236, at *1–3 (Tex. App.—Corpus Christi–Edinburg July 9, 2015, no pet.) (mem. op., not designated for publication).

329. See *Cunningham v. State*, 673 S.W.3d 280, 288–290 (Tex. App.—Texarkana 2023, no pet.).

330. See *Inman v. State*, No. PD-0251-22, 2023 WL 319573, at *1–2 (Tex. Crim. App. May 17, 2023) (per curiam).

331. *Id.* at *1.

332. *Id.* at *1–2 (Newell, J., concurring) (citing *Ruedas v. State*, 586 S.W.2d 520, 523 (Tex. Crim. App. 1979)).

333. *Id.* at *2 (Keel, J., dissenting).

334. See *Cunningham*, 673 S.W.3d at 285.

335. *Id.* at 286.

336. *Id.* at 286–87.

that, based on the timeline and the low level of drugs in his system, he could have used drugs before his probation began.³³⁷ Cunningham testified he ingested the drugs before his probation began, so he had not violated the no-drug-use condition.³³⁸

Citing Texas authority and relying on *Crawford v. Washington*,³³⁹ the appellate court held testimonial hearsay may only be admitted when the declarant is unavailable and when the defendant has had a prior opportunity to cross-examine the witness.³⁴⁰ It acknowledged the debate surrounding the criminal prosecution language in revocation caselaw dating back to *Hill*, *Morrissey*, and *Scarpelli*.³⁴¹ However, the court declared these proceedings adversarial and judicial.³⁴² The court stated it was error to ever apply the Supreme Court decisions to Texas.³⁴³

[N]either *Morrissey* nor *Scarpelli* considered whether the right of confrontation was available in revocation and parole proceedings under the Confrontation Clause of the Sixth Amendment. Instead, both cases found that, *under the federal system*, the “minimum requirements of due process” under the Fourteenth Amendment included the right to confrontation in both revocation and parole hearings because they could result in a loss of liberty. To use these cases to deny the right to confrontation in Texas adjudication and revocation proceedings under the Sixth Amendment simply because *Scarpelli* and *Morrissey* employed the language that federal revocations are not criminal prosecutions seems incongruous with . . . *Ex parte Doan* [in] that “there are few procedural differences between a Texas criminal trial and a Texas community-supervision revocation proceeding.”³⁴⁴

The Texarkana court cited a dissent from 1968, which predated the federal cases, declaring that substantial rights are affected in revocation proceedings.³⁴⁵ Judge Onion, the dissenter in that 1968 case, argued that “revocation proceedings could not be isolated from the rest of the criminal prosecution.”³⁴⁶ Using his reasoning, the Sixth Amendment and all of its rights and safeguards would apply to revocation hearings in Texas.³⁴⁷

337. *Id.* at 287.

338. *Id.*

339. *Crawford v. Washington*, 541 U.S. 36, 59 (2004).

340. *Cunningham*, 673 S.W.3d at 288 (quoting *De La Paz v. State*, 273 S.W.3d 671, 680 (Tex. Crim. App. 2008)).

341. *Id.*

342. *Id.* at 288–89.

343. *Id.* at 290.

344. *Id.* (emphasis added) (internal citations omitted) (quoting *Ex parte Doan*, 369 S.W.3d 205, 210 (Tex. Crim. App. 2012)).

345. *Id.* at 290–91 (citing *Crawford v. State*, 435 S.W.2d 148, 151 (Tex. Crim. App. 1968) (Onion, J., dissenting)).

346. *Id.* at 291.

347. *Id.*

The Texarkana court also determined that the statements offered against Cunningham were testimonial and inadmissible hearsay.³⁴⁸ Testimonial evidence includes interviews used to prove past events relevant to future prosecution or use at a later trial.³⁴⁹ The supervising probation officer had no personal knowledge about the violations; everything she read from the probation file was based on interviews between Cunningham and his probation officer who did not attend the hearing.³⁵⁰ The notes in the file were designed to establish probation violations in a future revocation hearing.³⁵¹ These statements were offered for the proof of the matter asserted.³⁵² As such, this testimonial hearsay violated Cunningham's right to confrontation.³⁵³

The lab results of the urine test, which the supervising officer read into evidence, also violated the Confrontation Clause.³⁵⁴ The State should have established that these witnesses were unavailable to testify and that Cunningham had an opportunity to cross-examine them before the testimony was admitted, but it failed to do either.³⁵⁵ The court found Cunningham was harmed by the testimony, as it was the only evidence used to establish the alleged violations.³⁵⁶ The court reversed his case and remanded it for a new hearing.³⁵⁷

The splits in Texas keep coming.³⁵⁸ The San Antonio appellate court recently held that the reason why certain rights do not apply in revocation hearings is due to the lower burden of proof and the less formal process.³⁵⁹ A year earlier, despite *Doan*, the same court found the revocation hearing administrative in nature.³⁶⁰ A few years before that, the Dallas appellate court confusingly held that the revocation hearing is administrative, it is part of the original sentencing phase, it is under the jurisdiction of the criminal trial judge who took the plea, but the process is not criminal in nature.³⁶¹

348. *Id.* at 292.

349. *See id.*

350. *Id.*

351. *Id.*

352. *Id.*

353. *Id.* at 292–93.

354. *Id.*

355. *Id.* at 293.

356. *Id.* at 293–94.

357. *Id.*

358. *See, e.g.,* *Thomas v. State*, 683 S.W.3d 889, 893 (Tex. App.—San Antonio 2024, no pet.) (stating revocation hearings are less formal proceedings); *Mijangos v. State*, 678 S.W.3d 270, 271 (Tex. App.—San Antonio 2023, no pet.) (holding revocation hearings are administrative hearings); *Porras v. State*, 629 S.W.3d 288, 290 (Tex. App.—Dallas 2020, pet. ref'd) (holding revocation proceedings are administrative hearings rather than the criminal proceedings).

359. *Thomas*, 683 S.W.3d at 893. *But see* *Gagnon v. Scarpelli*, 411 U.S. 778, 789 n.12 (1973) (stating that because the burden in proof in a juvenile delinquency hearing, which is a type of revocation, is beyond a reasonable doubt, it is akin to a criminal trial).

360. *Mijangos*, 678 S.W.3d at 271.

361. *Porras*, 629 S.W.3d at 290.

Texas intermediate appellate courts seem incapable of reaching a consensus on how to label the revocation hearing, whether U.S. Supreme Court cases control, and which rights a defendant has at these proceedings. Until the Texas Court of Criminal Appeals decides this issue, the state of the law remains unsettled and inconsistent. Whether a probationer has confrontation rights under the Sixth Amendment, the Fourteenth Amendment, or at all depends on where he lives and completes his probation in Texas.

D. The Dangers of Unreliable Evidence in Revocation Hearings

Not only is reliance on hearsay a problem for the truth-seeking function of the revocation hearing, it can also deny defendants the opportunity to be rehabilitated, which is the purpose of community supervision.

Torres v. State, a Houston case, illustrates this well.³⁶² In *Torres*, a seventeen-year-old defendant pled guilty to aggravated robbery, and was placed on deferred adjudication for ten years, with a condition he take part in a shock-probation, jail-based drug program for six months before his release.³⁶³ After he entered the program, his supervisors gave him mixed reviews; they ultimately recommended his removal due to behavioral problems.³⁶⁴ Shortly thereafter, the State sought to adjudicate his deferred sentence.³⁶⁵

At the hearing, the State called two witnesses—one a custodian of records, the other a drug-treatment coordinator—neither of whom had personal knowledge about Torres’s behavior while enrolled in the program.³⁶⁶ The coordinator testified from a report that alleged Torres “refus[ed] to conform to rules,” used offensive language and slurs, and engaged in offensive behavior.³⁶⁷ Torres objected, arguing that the coordinator’s testimony violated his right to confront the witnesses with personal knowledge.³⁶⁸ On cross-examination, the coordinator admitted “he did not know who made the allegations contained in the report, that it could have been a staff member or a fellow inmate, and that he could not personally assess the veracity or credibility of any of the allegations.”³⁶⁹

Torres testified at the hearing; he denied using offensive language; he said he had complied with the conditions of his deferred adjudication; he may have fallen asleep in class once, but all other allegations came from inmates

362. *Torres v. State*, 617 S.W.3d 95 (Tex. App.—Houston [1st Dist.] 2020, pet. ref’d).

363. *Id.* at 98.

364. *Id.*

365. *Id.*

366. *Id.* at 98–99.

367. *Id.* at 99.

368. *Id.* at 99–100.

369. *Id.* at 100.

who disliked him.³⁷⁰ He had completed the program, he sincerely wanted to avoid drugs to keep his family together, and he had been housed in jail an additional five months pending the hearing without incident.³⁷¹ At the end of the hearing, the trial court granted the State's motion to adjudicate and sentenced Torres to twenty years in prison.³⁷²

On appeal, the Houston First Court of Appeals recognized (1) the unsettled state of law in Texas post-*Doan* and (2) that the Court of Criminal Appeals never overruled pre-*Doan* cases labeling revocation and adjudication hearings administrative in nature.³⁷³ However, the *Torres* court ultimately skipped the confrontation issue to address a legal sufficiency issue.³⁷⁴ The court found the statements in the report were conclusory and insufficient to support his termination from the drug treatment program.³⁷⁵ There were no incident or offense reports detailing violations.³⁷⁶ There were no witnesses with personal knowledge about his alleged bad behavior.³⁷⁷ The court found Torres's testimony, on the other hand, detailed and credible.³⁷⁸

The Houston appellate court found the judge abused his discretion when he adjudicated Torres based solely on conclusory statements and unreliable hearsay.³⁷⁹ While the issue was on appeal, the trial court's decision resulted in Torres's continued incarceration and his dismissal from a program designed to rehabilitate him and return him to the community.³⁸⁰

Though the *Torres* court avoided resting its decision on the Confrontation Clause, it did acknowledge that adjudication proceedings involve a loss of liberty and cannot be based on hearsay or testimonial statements from absent witnesses.³⁸¹ The court also recognized that there is personal and societal value in the rehabilitation of defendants that courts should not arbitrarily take away.³⁸² After *Torres*, the Court of Criminal Appeals avoided ruling on this issue when it had the opportunity to do so.³⁸³ It remains to be seen whether the Court will decide whether judicial proceedings, a type of proceeding for which there is no established Confrontation Clause standard because *Doan* created it, will invoke the same confrontation rights as a criminal proceeding.³⁸⁴

370. *Id.*

371. *Id.* at 100–101.

372. *Id.* at 101.

373. *Id.*

374. *Id.* at 102.

375. *Id.* at 104.

376. *Id.*

377. *Id.*

378. *Id.* at 104–105.

379. *Id.* at 105.

380. *Id.*

381. *Id.* at 103–105.

382. *Id.*

383. *Hughes v. State*, 691 S.W.3d 504, 521 (Tex. Crim. App. 2024).

384. *See Ex parte Doan*, 369 S.W.3d 205, 212 (Tex. Crim. App. 2012).

The dangers of allowing hearsay in revocation hearings are clearly reflected in *Torres*.³⁸⁵ A seventeen-year-old, who pled guilty to a felony, was within one week of completing his six-month drug-treatment program when someone recommended he be removed from it, and his probation revoked.³⁸⁶ After the program ended, his drug-treatment counselor, on the other hand, stated he had successfully completed the program and had done everything asked of him with a good attitude.³⁸⁷ Two witnesses testified at the hearing relying completely on hearsay statements from witnesses who were never identified, using reports they did not produce, and without any personal knowledge about the substance of their own testimony.³⁸⁸ As a result, Torres went from being on deferred adjudication to being sentenced to prison for twenty years.³⁸⁹ Torres was not permitted to question or challenge any of the witnesses whose statements formed the basis to adjudicate.³⁹⁰ Were it not for the Houston Court of Appeals' reversal based on the trial court's abuse of discretion, he would still be in prison.³⁹¹ *Torres* illustrates the harm unreliable hearsay can cause when it is admitted in a revocation hearing.³⁹² This is only one example of a revocation based on unreliable hearsay evidence.³⁹³

V. CONSTITUTIONAL CONSIDERATIONS

This Section will address arguments courts should consider when looking at the role hearsay and confrontation play in revocation hearings.³⁹⁴ It will examine history, liberty interests, and arguments that support revocations being considered part of the criminal proceeding.³⁹⁵

385. *Torres*, 617 S.W.3d at 97.

386. *Id.* at 97–98.

387. *Id.* at 98.

388. *Id.* at 98–99.

389. *Id.* at 98, 101.

390. *Id.*

391. *See id.* at 105.

392. *See id.*

393. *See id.*

394. *See, e.g.*, Alan C. Michaels, *Trial Rights at Sentencing*, 81 N.C. L. REV. 1771, 1779–80 (2003) (discussing the lack of clarity surrounding the applicability of trial rights at sentencing proceedings); Sanders I, *supra* note 176, at 1260–61; *In re M.P.*, 220 S.W.3d 99, 104–106 (Tex. App.—Waco 2007, pet. denied) (discussing inconsistent Supreme Court application of Sixth Amendment rights in criminal cases); *see also* Chhablani, *supra* note 116, at 489–99, 504, 516 (noting that the Supreme Court tangled the Due Process Clause with the Confrontation Clause, which led to “textually inconsistent restrictive readings”).

395. *See generally infra* Sections V.A–V.C (arguing for Confrontation Clause rights in revocation hearings).

A. Historical Reasons for the Sixth Amendment's Application

Scholars and courts have noted that Sixth Amendment jurisprudence is not uniform.³⁹⁶ This Section will address multiple aspects of confusion based upon the inconsistent application of the Sixth Amendment.

The phrase criminal prosecution has not been applied consistently at the federal level, even among the various rights housed within the Sixth Amendment.³⁹⁷ While the phrase is frequently defined in the context of the right to counsel within the Sixth Amendment,³⁹⁸ there does not appear to be any case that defines “criminal prosecution” in the context of confrontation rights. *Morrissey* deemed the parole process administrative, and only generally referenced the criminal prosecution language.³⁹⁹ *Scarpelli* declared probation revocations were not part of the criminal prosecution without any explanation and addressed due process rights alone.⁴⁰⁰ One scholar noted the Supreme Court's trial rights opinions “have a decidedly ad hoc flavor—articulating different grounds for decisions and frequently ignoring the other parts of its jurisprudence.”⁴⁰¹

There are other inconsistencies with the application of the Sixth Amendment in Texas.⁴⁰² The Waco Court of Appeals recognized that “the guarantees of the Sixth Amendment do not apply with equal force at every stage of a criminal prosecution.”⁴⁰³ It noted the Supreme Court has been largely inconsistent in applying the Sixth Amendment rights in criminal cases.⁴⁰⁴ The Waco court concluded that the Sixth Amendment Confrontation Clause applied to some but not all aspects of the punishment phase.⁴⁰⁵ This uneven application of rights may explain appellate court confusion about the Sixth Amendment's breadth and depth of application.⁴⁰⁶

Another source of confusion is whether the Supreme Court has ever held the Sixth Amendment Confrontation Clause applies to either sentencing or revocation proceedings.⁴⁰⁷ The Court has never technically addressed the Confrontation Clause's application to a probation revocation hearing.⁴⁰⁸

396. See Chhablani, *supra* note 116, at 504.

397. Michaels, *supra* note 394.

398. *E.g.*, *Rothgery v. Gillespie Cnty.*, 554 U.S. 191, 198 (2008) (discussing criminal prosecution in the context of the right to counsel).

399. *Morrissey v. Brewer*, 408 U.S. 471, 475, 478, 480, 486 (1972).

400. *Scarpelli*, 411 U.S. at 782.

401. Michaels, *supra* note 394, at 1862.

402. *In re M.P.*, 220 S.W.3d 99, 104 (Tex. App.—Waco 2007, pet. denied).

403. *Id.*

404. *Id.* at 104–106.

405. See *id.* at 105.

406. Michaels, *supra* note 394, at 1862.

407. See *supra* Section IV.D (discussing how different states and courts have applied the Sixth Amendment and the *Morrissey* and *Scarpelli* decisions).

408. Michaels, *supra* note 394, at 1837 (“Technically speaking, the Supreme Court has never decided whether the Confrontation Clause applies at sentencing.”).

Defendants in the early punishment and sentencing cases—*Escoe*, *Townsend*, and *Williams*—never raised a Confrontation Clause claim.⁴⁰⁹ Both *Morrissey* and *Scarpelli* were appealed on the basis of the Due Process Clause, not the Sixth Amendment’s Confrontation Clause.⁴¹⁰ The lower courts, both at the state and federal levels, have said the Sixth Amendment right does not apply to revocation proceedings.⁴¹¹

These courts did not reach this interpretation from reading the text of the Sixth Amendment, which is much more inclusive.⁴¹² The rights housed in the Sixth Amendment, including confrontation, apply to “*all* criminal prosecutions.”⁴¹³

Looking to the Framers and history helps better understand the Sixth Amendment’s possible application.⁴¹⁴ The confrontation rights found in both the Sixth Amendment’s Confrontation Clause and the Fourteenth Amendment’s Due Process Clause share ancient roots dating back to the Bible and the height of the Roman Empire.⁴¹⁵ In the Bible, when Paul, a disciple of Christ, was imprisoned in Rome a government official told Agrippa, a Roman military leader and statesman, “. . . it is not the Roman custom to hand over anyone before they have faced their accusers and have had an opportunity to defend themselves against the charges.”⁴¹⁶ The Supreme Court has recognized that American confrontation and cross-examination rights are grounded in these ancient rights.⁴¹⁷

The Framers included the Confrontation Clause for reasons that look eerily similar to the concerns raised in modern-day revocation cases.⁴¹⁸ Defendants were tried on evidence that consisted of affidavits and depositions by magistrates, leaving the defendant without a face-to-face ability to examine the witnesses.⁴¹⁹ Prosecutors read depositions, confessions, and other documents to the court in lieu of calling live witnesses.⁴²⁰ Defendants objected to their inability to confront witnesses in person.⁴²¹

409. See generally *Escoe v. Zerbst*, 295 U.S. 490 (1935) (not discussing the Confrontation Clause); *Townsend v. Burke*, 334 U.S. 736 (1948) (same); *Williams v. New York*, 337 U.S. 241 (1949) (same).

410. See *supra* notes 182–228 (outlining the Court’s holdings in *Morrissey* and *Scarpelli*).

411. See *supra* cases cited note 26 (listing cases where Texas courts have not applied the Sixth Amendment to revocation proceedings); *supra* notes 233–65 and accompanying text (discussing the various approaches to applying the Sixth Amendment to revocation proceedings across the United States).

412. See *supra* notes 233–65 (illustrating various state applications of the Sixth Amendment to revocation hearings).

413. U.S. CONST. amend VI (emphasis added).

414. See *Sanders I*, *supra* note 176, at 1264.

415. *Greene v. McElroy*, 360 U.S. 474, 496 (1959); *Hong*, *supra* note 125, at 259–62.

416. *Acts* 25:16; *Greene*, 360 U.S. at 496.

417. *Greene*, 360 U.S. at 496.

418. *Sanders I*, *supra* note 176, at 1286.

419. See *California v. Green*, 399 U.S. 149, 156 (1970).

420. See *id.* at 157.

421. See *id.*

However, “no objection was made against receiving a witness’[s] out-of-court depositions or statements, so long as the witness was present at trial to repeat his story and to explain or repudiate any conflicting prior stories before the trier of fact.”⁴²² What the Framers sought to prevent was admission of documents in lieu of live testimony; the latter allowed the accused to test recollections, sift the witness’s conscience and character, judge demeanor, and view physical, mental, and verbal indications of the witness’s credibility.⁴²³

When the Sixth Amendment was written, the trial that led to conviction and the sentencing process were indistinguishable.⁴²⁴ Three years after the Amendment’s ratification,⁴²⁵ a North Carolina court held that “no man shall be prejudiced by evidence which he had not the liberty to cross examine.”⁴²⁶ In the early 1800s, criminal prosecution included everything up to the final judgment.⁴²⁷ Later historians defined criminal prosecution as continuing until after the sentence was pronounced.⁴²⁸

The Supreme Court in *Crawford v. Washington* described the kind of testimony that was particularly offensive to the Framers:

The text of the Confrontation Clause . . . applies to “witnesses” against the accused—in other words, those who “bear testimony.” “Testimony,” in turn, is typically “[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.” An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not. The constitutional text, like the history underlying the common-law right of confrontation, thus reflects an especially acute concern with a specific type of out-of-court statement.⁴²⁹

This Author recognizes that appellate courts in Texas and elsewhere have held that *Crawford* does not apply to probation revocation hearings.⁴³⁰ But the analysis in that case, as well as the intent the Framers had when they wrote the Confrontation Clause, share a common concern relevant to revocations.⁴³¹ Defendants complain that when a witness reads a document

422. *Id.* at 155.

423. *See id.* at 158.

424. Sanders I, *supra* note 176, at 1262–63.

425. Chhablani, *supra* note 116.

426. State v. Webb, 2 N.C. (1 Hayw.) 103, 104 (1794); Sanders I, *supra* note 176, at 1283.

427. Sanders I, *supra* note 179, at 1263–64.

428. *Id.* at 1264.

429. *Crawford v. Washington*, 541 U.S. 36, 51 (2004).

430. *E.g.*, Diaz v. State, 172 S.W.3d 668, 669 (Tex. App.—San Antonio 2005, no pet.) (listing numerous jurisdictions that have held *Crawford* does not apply to probation revocation proceedings); Smart v. State, 153 S.W.3d 118, 121 (Tex. App.—Beaumont 2005, pet. ref’d) (same); State v. Rose, 171 P.3d 253, 258 (Idaho 2007) (same); *see Hong, supra* note 125, at 248–49.

431. *See generally Crawford*, 541 U.S. 36 (analyzing hearsay testimony as the Framers of the Constitution would).

that includes testimonial statements, it denies them an opportunity to confront the truth of the accusations as well as test the credibility of their accusers.⁴³²

The Sixth Amendment Confrontation Clause could also apply based upon the important nature of what is at stake at a revocation hearing.⁴³³ It has repeatedly stated that the basic purpose of the Confrontation Clause is to promote and ensure “the integrity of the factfinding process.”⁴³⁴ The Supreme Court has also repeatedly said that integrity is upheld through cross-examination of witnesses.⁴³⁵ The *Crawford* Court said it best: “Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation.”⁴³⁶

The Confrontation Clause encompasses four procedural safeguards: live testimony, sworn testimony, testimony subject to cross-examination, and the fact-finder’s ability to observe the demeanor of witnesses when they testify.⁴³⁷ Some have argued that over time, reliability and firmly rooted hearsay exceptions have become surrogates for cross-examination.⁴³⁸ Regardless, unreliable hearsay evidence, the kind that does not fit into any firmly rooted exception, cannot act as a substitute for confrontation.⁴³⁹

Justice Scalia, in *Maryland v. Craig*’s dissent, said that face-to-face confrontation guarantees the evidence is reliable.⁴⁴⁰ Justice Thomas, in his *Crawford* concurrence, stated:

Admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation. To be sure, the Clause’s ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.⁴⁴¹

When witnesses read from reports that contain hearsay, double hearsay, or even triple hearsay,⁴⁴² the sentencing process lacks integrity because the defendant has no way to confirm, without cross-examination, that the fact-finding process is indeed based on facts.⁴⁴³ As illustrated by earlier cases

432. See *Dupas v. State*, No. 07-22-00117-CR, 2022 WL 5052714, at *1 (Tex. App.—Amarillo Oct. 4, 2022, pet. ref’d) (mem. op., not designated for publication).

433. See *Kentucky v. Stincer*, 482 U.S. 730, 736 (1987); *White v. Illinois*, 502 U.S. 346, 357 (1992); *Coy v. Iowa*, 487 U.S. 1012, 1020 (1988).

434. See *Stincer*, 482 U.S. at 735.

435. *Id.* at 736; *Douglas v. Alabama*, 380 U.S. 415, 418 (1965).

436. *Crawford v. Washington*, 541 U.S. 36, 68–69 (2004).

437. *Maryland v. Craig*, 497 U.S. 836, 845–46 (1990).

438. Chhablani, *supra* note 116, at 514.

439. See *id.*

440. *Craig*, 497 U.S. at 862 (Scalia, J., dissenting).

441. *Crawford*, 541 U.S. at 61 (Thomas, J., concurring).

442. Sanders I, *supra* note 176, at 1288–89.

443. See *Coy v. Iowa*, 487 U.S. 1012, 1019–20 (1988).

in this Article, when the process lacks integrity, so too does the judge's determination and sentence.⁴⁴⁴ Integrity matters, especially when a person's liberty could be forfeited.⁴⁴⁵

B. Liberty Mandates Fact-Based Revocations

The Sixth Amendment should apply for all of the reasons stated above. States, who consistently set the constitutional bar higher, could also create confrontation requirements for revocation proceedings for the reasons stated above. However, if Texas (or any other state) adheres to the practice of using the Fourteenth Amendment's Due Process Clause, good cause for excusing confrontation must be required due to the Clause's guarantee of fundamental fairness; it cannot merely be preferred or stated but ignored.⁴⁴⁶

According to the Fourteenth Amendment, states cannot deprive liberty without due process of law.⁴⁴⁷ "[T]he touchstone of due process is fundamental fairness."⁴⁴⁸ As stated earlier, many courts have stated the liberty one experiences on probation is conditional. If probation liberty is conditional, the state is free to set conditions on the liberty. But if the state sets conditions, there should be a minimum degree of due process available to revoke probation. Probation cannot be taken away arbitrarily.⁴⁴⁹

Morrissey and *Scarpelli* held that the Due Process Clause applies to revocation hearings, and that due process requires showing good cause to excuse a witness from testifying.⁴⁵⁰ Why have prosecutors in so many revocation hearings since that time (1) failed to call a witness with knowledge, and (2) excused the prosecutor from showing good cause to explain why that witness is absent?⁴⁵¹ This Section will take a closer look at the circular reasoning courts tolerate when the state fails to establish, and the courts fail to require good cause.

When it comes to confrontation, the Supreme Court has held that a probationer may cross-examine adverse witnesses unless the State offers and

444. See *Kentucky v. Stincer*, 482 U.S. 730, 736 (1987); *White v. Illinois*, 502 U.S. 346, 357 (1992); *Coy*, 487 U.S. at 1020 (1988).

445. See generally *Crawford*, 541 U.S. at 61 (Thomas, J., concurring) (discussing that the Sixth Amendment ensures reliable evidence by requiring it be tested by cross-examination).

446. *California v. Trombetta*, 467 U.S. 479, 485 (1984) ("Under the Due Process Clause of the Fourteenth Amendment, criminal prosecutions must comport with prevailing notions of fundamental fairness. We have long interpreted this standard of fairness to require that criminal defendants be afforded a meaningful opportunity to present a complete defense.").

447. U.S. CONST. amend XIV.

448. *Euler v. State*, 218 S.W.3d 88, 91 (Tex. Crim. App. 2007).

449. See *Tapia v. State*, 462 S.W.3d 29, 40 (Tex. Crim. App. 2015).

450. *Morrissey v. Brewer*, 408 U.S. 471, 480 (1972); *Gagnon v. Scarpelli*, 411 U.S. 778, 779 (1973).

451. See *Reyes v. State*, 868 N.E.2d 438, 441 (Ind. 2007).

the judge finds good cause.⁴⁵² But this standard is not uniformly enforced.⁴⁵³ There are states that use good cause as a standard, some to a greater degree and some to a lesser degree.⁴⁵⁴ Though *Morrissey* and *Scarpelli* adopted it to ensure due process at parole and probation revocation hearings, not all states enforce it.⁴⁵⁵ When a prosecutor calls a witness to make testimonial hearsay statements without showing good cause, it denies defendants due process.⁴⁵⁶

1. The Fallacy of Conditional Liberty

The conditioned liberty concept in revocation hearings has weakened the due process standard over time.⁴⁵⁷ The Supreme Court cases reflect a shift in thinking about the liberty of a defendant.⁴⁵⁸ In the 1930s, *Escoe* was taken from probation to prison without a hearing.⁴⁵⁹ The Supreme Court said the charge against him might be based on rumor, mistake, or malice, so he must be able to challenge it “before the word of his pursuers is received to his undoing.”⁴⁶⁰ Though the Court acknowledged Congress did not envision a probation revocation hearing resembling a trial, it did recognize that being incarcerated following revocation had the potential to destroy a person’s life.⁴⁶¹ The *Escoe* Court did not take his liberty interest lightly.⁴⁶²

It was not until the *Morrissey* case, in the 1970s, that the Court framed liberty interests (albeit in a parole revocation setting) as conditional.⁴⁶³ The Court emphasized the importance of having an accurate representation of facts that depict the severity of the violations because the person could face substantial imprisonment.⁴⁶⁴ In *Scarpelli*, the Supreme Court recognized that probationers facing revocation could experience a loss of liberty.⁴⁶⁵ Again, the Supreme Court valued the defendants’ liberty interests in these two decisions.⁴⁶⁶

452. *Gagnon v. Scarpelli*, 411 U.S. 778, 779 (1973); LAFAVE ET AL., *supra* note 63, § 26.10(c).

453. *See supra* Section III.B (noting the ways different courts and states have applied the Sixth Amendment to revocation hearings); LAFAVE ET AL., *supra* note 63, § 26.10(c).

454. *Reyes v. State*, 868 N.E.2d 438, 441 (Ind. 2007).

455. *See* LAFAVE ET AL., *supra* note 63, § 26.10(c).

456. *See Scarpelli*, 411 U.S. at 779; *California v. Trombetta*, 467 U.S. 479, 485 (1984).

457. *See Escoe v. Zerbst*, 295 U.S. 490, 492–93 (1935).

458. *Compare Escoe*, 295 U.S. at 492 (upholding probationer’s statutory right to a hearing), *with Morrissey v. Brewer*, 408 U.S. 471 (1972) (stating that revocation only deprives an individual of conditional liberty).

459. *Escoe*, 295 U.S. at 492.

460. *Id.* at 493.

461. *See id.*

462. *See id.*

463. *Morrissey*, 408 U.S. at 480.

464. *Id.*

465. *Gagnon v. Scarpelli*, 411 U.S. 778, 782 (1973).

466. *See id.*; *Morrissey*, 408 U.S. at 480.

Since then, however, courts have fixated on the conditional liberty of probationers as a way of denying confrontation rights.⁴⁶⁷ For example, the Maine Supreme Court stated, “In the revocation proceeding, . . . the probationer risks not the absolute liberty to which every citizen is entitled, but only the conditional liberty properly dependent on observation of special probation restrictions.”⁴⁶⁸ It is true that a probation comes with conditions that must continue to be met for the person to remain living in the community.⁴⁶⁹ But whether a person is sentenced to prison for years initially or following revocation, it is still a loss of liberty.⁴⁷⁰

A prison sentence causes great harm to a person: it can result in losing one’s job and income, and it can harm familial and personal relationships.⁴⁷¹ Any distinction between conditional and unconditional liberty is irrelevant to the incarcerated person.

Consider the case of a young man from Kansas who was given a year’s probation for drug offenses.⁴⁷² At his revocation hearing, the State called a probation officer who testified about two failed drug tests she did not perform; the judge revoked his probation and sentenced him to fifteen years to life in prison.⁴⁷³ Even if his liberty was deemed conditional, it nevertheless required some measure of due process protections.⁴⁷⁴

Additional liberty concerns exist. In a revocation hearing, the judge may consider the original crime that led to the probation, as well as the conditions that were violated.⁴⁷⁵ While the Texas Court of Criminal Appeals has suggested that the focus should be on condition violations, not allegations of new crimes,⁴⁷⁶ a universal condition of community supervision is to obey the law.⁴⁷⁷ Probation officers and prosecutors regularly raise new crime violations in these hearings; a substantial number of revocations stem from these violations.⁴⁷⁸ Courts consider them when making sentencing decisions; the harshest punishments come from violating this condition.⁴⁷⁹ The Court of Criminal Appeals should not ask trial courts to ignore new crimes at a

467. *E.g.*, *Commonwealth v. Durling*, 551 N.E.2d 1193, 1197–98 (Mass. 1990) (noting that probationers who violate conditions imposed on them can have their liberty taken away).

468. *State v. Maier*, 423 A.2d 235, 238–39 (Me. 1980).

469. *See supra* Section II.A (explaining conditions on probation).

470. *See generally* *Gagnon v. Scarpelli*, 411 U.S. 778, 782 & n.3 (discussing that parole revocation can result in a probationer’s loss of liberty).

471. *Gerstein v. Pugh*, 420 U.S. 103, 114 (1975).

472. *State v. Graham*, 30 P.3d 310, 312 (Kan. 2001).

473. *Id.* at 312–13.

474. *Id.* at 311.

475. *See Schuman I, supra* note 7, at 1821–22.

476. *See State v. Waters*, 560 S.W.3d 651, 659 (Tex. Crim. App. 2018).

477. *Schuman I, supra* note 7, at 1821.

478. *Id.*

479. *E.g., id.* at 1844–48; *Bowden v. State*, 627 S.W.2d 834, 836 (Tex. App.—Fort Worth 1982, no writ) (stating that an “affirmative finding would supply justification for imposing a more severe sentence”); *New Hampshire v. Field*, 571 A.2d 1276, 1278 (N.H. 1990) (noting concerns about the defendant’s “augmented sentence”).

revocation hearing when “do not commit any new crimes” is a universal condition of community supervision, and the basis for the majority of post-revocation incarcerations.⁴⁸⁰

Revocation sentencing practices in states vary widely.⁴⁸¹ In some states, like Arizona, Florida, New York, Oregon, and Pennsylvania, a judge may sentence someone following revocation up to the maximum prison sentence for the underlying crime.⁴⁸² In these instances, no one knows whether the new sentence would have been the same as one imposed in lieu of probation.⁴⁸³ It could be the same, it could be slightly longer, or it could be significantly longer because of the violations.⁴⁸⁴

Other states like Alabama, Indiana, and Maine, fix a term of years that judges may not exceed if they revoke probation.⁴⁸⁵ Some judges can extend the length of probation and the conditions if the defendant violates the original conditions.⁴⁸⁶ “This flexibility allows courts to cycle people in and out of prison over long periods of time, sometimes even decades, for repeated probation violations.”⁴⁸⁷

Characterizing liberty as conditional has practically meant that courts, through their actions, believe probations deserve less due process. Though process at trial differs from process post-conviction, “the deprivation of liberty should always be hedged with safeguards to stand between the individual and the exercise of state power.”⁴⁸⁸

2. *Should Burden and Convenience Outweigh Liberty Interests?*

Courts have long expressed concern over having a revocation process that overburdens the state and the courts.⁴⁸⁹ In *Durling*, the Massachusetts Supreme Court articulately detailed the stakes in a revocation hearing.⁴⁹⁰ The probationer does not want his liberty interest or opportunity for rehabilitation taken away arbitrarily.⁴⁹¹ The government has a public safety interest when someone on probation is not compliant, which should be taken care of

480. Fish, *supra* note 2, at 1406.

481. *See id.* at 1387–89.

482. *Id.* at 1388.

483. *See id.* at 1388–89.

484. *See id.*

485. *See id.*

486. *See id.* at 1389.

487. *Id.*

488. Piar, *supra* note 12, at 166.

489. *E.g.*, *Mempa v. Rhay*, 389 U.S. 128, 137 (1967) (suggesting that revocation hearings may burden the judiciary); *Gagnon v. Scarpelli*, 411 U.S. 778, 785 (1973) (noting burden on the officer and State); *State v. Maier*, 423 A.2d 235, 238–39 (Me. 1980) (identifying burden from requiring proof of violation at revocation hearings); *Commonwealth v. Durling*, 551 N.E.2d 1193, 1197–98 (Mass. 1990) (recognizing burden on efficiency and cost).

490. *Durling*, 551 N.E.2d at 1197–98.

491. *Id.* at 1197.

promptly using every bit of reliable evidence available.⁴⁹² Society benefits from a rehabilitated person; it only benefits from revocation when there is a factual basis for it.⁴⁹³ The *Durling* court then said this about burdens: “[W]e are well aware of the crowded dockets and the limited resources of the trial courts. The burden of requiring extensive, fact-intensive hearings is a heavy one.”⁴⁹⁴ Trial courts will always have an interest in administrative efficiency and low costs.⁴⁹⁵

While the *Durling* Court considered all interests in a thoughtful and beautifully written decision, it ended its consideration with state burdens.⁴⁹⁶ The burdens are real: officers may have to travel, probation officers may have to cancel scheduled appointments with the people they supervise, witnesses to criminal activity may have to come to court, and courts will have to schedule hearings when these witnesses can appear.⁴⁹⁷ Challenges also arise when a person in one state or county commits a crime while on probation in another state or county.⁴⁹⁸ The prosecutor raised this argument in *Scarpelli*.⁴⁹⁹

All of these factors, indeed place burdens on the Government, but are no different than the burdens of trial, hearings on motions to suppress evidence, and other common adversarial procedures in the criminal justice system. These “burdensome” processes are founded on constitutional rights and protections, yet courts are still able to conduct their business.

In a revocation hearing, the confrontation right only applies to testimonial hearsay.⁵⁰⁰ Safeguarding this right is limited in scope and not overly burdensome.⁵⁰¹ The State can guarantee confrontation *and* prove violations.⁵⁰² In another criminal procedure involving confrontation rights in a capital murder sentencing, a California court said, “[Upholding the right to confront] does not render the government unable to prove their allegations It merely requires the government to provide evidence through witnesses who have firsthand knowledge of the events in question, rather than through stacks of silent documents replete with unconstitutional hearsay.”⁵⁰³

492. *Id.* at 1197–98.

493. *See id.* at 1198.

494. *Id.*

495. *See id.*

496. *See id.*

497. *See id.*

498. COHEN, *supra* note 104.

499. *Gagnon v. Scarpelli*, 411 U.S. 778, 782 n.5 (1973) (“Petitioner’s greatest concern is with the difficulty and expense of procuring witnesses from perhaps thousands of miles away.”).

500. *Hong*, *supra* note 125, at 271.

501. *See id.* at 271–72.

502. *United States v. Mills*, 446 F. Supp. 2d 1115, 1130 (C.D. Cal. 2006).

503. *Id.* at 1130.

The *Escoe*, *Townsend*, and *Mempa* courts were not concerned with burdens.⁵⁰⁴ In *Escoe*, the Supreme Court discussed an inquiry that ensured the trial court made the right decision; that inquiry was designed to protect the probationer from malicious or false testimony.⁵⁰⁵ In *Townsend*, the Court preferred the defendant be represented by counsel to avoid sentencing premised on misinformation, even if it meant the process was longer or more complicated.⁵⁰⁶ *Mempa* held that allowing a right to counsel in revocation hearings would not overburden the government.⁵⁰⁷ The *Mempa* Court expressed concern over the person's potential lost rights; having a lawyer would safeguard those rights.⁵⁰⁸

Williams was the first case to place expediency as a priority by relying more heavily on probation reports.⁵⁰⁹ The *Williams* majority expressed concern that the defense would rehash the underlying facts of the offense, as well as delay the sentencing process.⁵¹⁰ This could be said about any right: claiming it burdens others and causes government delays.⁵¹¹ Government expediency and cost will always compete with the exercise of rights.⁵¹² Courts must find a way to balance the government's interests with the need to base revocation on reliable evidence and facts.⁵¹³

The good cause standard in *Morrissey* and *Scarpelli* was designed to ensure that courts properly balance due process rights, including the right to confront witnesses, with the burden of requiring live testimony.⁵¹⁴ The *Scarpelli* Court wanted to avoid trial-like proceedings because of the sheer number of revocations and their costs.⁵¹⁵ But many of the things that concerned the *Scarpelli* Court—appointment of counsel, an adversarial process, and appeals—already exist in today's revocation process. Texas has a highly adversarial process, yet revocations occur daily across the state.⁵¹⁶ Moreover, they occur in states that mandate Sixth Amendment confrontation

504. See generally *Escoe v. Zerbst*, 295 U.S. 490, 492–93 (1935) (explaining that an accused probationer has a right to confront his accusers); *Townsend v. Burke*, 334 U.S. 736, 741 (1948) (sentencing a prisoner without counsel based on false information violates due process).

505. *Escoe*, 295 U.S. at 492–93.

506. *Townsend*, 334 U.S. at 740–41.

507. *Mempa v. Rhay*, 389 U.S. 128, 137 (1967).

508. See *id.*

509. *Williams v. New York*, 337 U.S. 241, 549–50 (1949).

510. *Id.* at 250.

511. *Id.* at 251.

512. See Bruce Zucker, *The Right to Confront Adverse Witnesses at Post-Conviction Release Revocation Hearings*, 34 NEW ENG. J. CRIM. & CIV. CONFINEMENT 87, 95 (2008).

513. See *id.*

514. *Morrissey v. Brewer*, 408 U.S. 471, 483–84 (1972); *Gagnon v. Scarpelli*, 411 U.S. 778, 786 (1973).

515. *Scarpelli*, 411 U.S. at 787–89.

516. See *The TCJE Probation Data Visualization Project*, TEX. CTR. FOR JUST. & EQUITY, <https://tcjedashboard.org/> (last visited Sept. 2, 2025).

rights in these proceedings.⁵¹⁷ The burden of requiring the Government to prove condition violations with more than hearsay has not slowed revocations.⁵¹⁸

If confrontation rights or mandated good cause showings applied to revocation proceedings, they could make the state realize the importance of the liberty interests in this proceeding.⁵¹⁹ They could also make the state allocate scarce resources when it is willing to back up allegations of revocation with live testimony.⁵²⁰ The live testimony could lead to more accurate sentencing decisions and fewer hearings for only those most deserving of revocation.⁵²¹

Courts should not prioritize their perceived burdens over confrontation rights, regardless of whether those rights are conferred by the Due Process Clause or by the Sixth Amendment.⁵²² Whatever higher bar is set to ensure reliability in the revocation proceeding, the government will meet it and revocations will continue to happen regularly.⁵²³ Constitutional rights will always outweigh any burden the government may face.⁵²⁴

3. Facts and Truth Matter

Fact finding is not limited to trial, sentencing, or punishment.⁵²⁵ It is also important at a revocation hearing.⁵²⁶ This is because probation often (but not always) follows a plea of guilt.⁵²⁷ Most, if not all, of the facts of the underlying crime *and* the condition violations will be established by the

517. See generally *id.* (providing probation data for several Texas jurisdictions, some of which have applied the Sixth Amendment to revocation proceedings).

518. *E.g.*, *Sams v. State*, 48 So. 3d 665, 668 (Ala. 2010) (stating that any hearsay evidence admitted must be reliable and may not be used as the sole basis for probation revocation); *Collins v. State*, 897 A.2d 159, 160–61 (Del. 2006) (“[P]robation cannot be revoked solely upon the basis of testimony of a witness with ‘no first-hand knowledge of the events constituting the violations.’”); *Laing v. State*, 200 So. 3d 166, 168 (Fla. Dist. Ct. App. 2016) (finding that parole revocation may only occur if violations are supported by “competent, substantive evidence” and not hearsay); *State v. Lewis*, 329 N.E.2d 390, 393 (Ill. Ct. App. 1975) (holding that hearsay is insufficient evidence for purposes of probation revocation); *Commonwealth v. Durling*, 551 N.E.2d 1193, 1199 (Mass. 1990) (ruling that hearsay evidence is insufficient evidence to revoke probation); *State v. Allen*, 624 S.E.2d 431, *2 (N.C. Ct. App. 2006) (stating that parole revocation may not occur based only on hearsay); *State v. Alderman*, 590 N.E.2d 836, 838 (Ohio Ct. App. 1990) (finding that the Fourteenth Amendment prohibits hearsay evidence in probation revocation hearings unless the court makes a good cause finding that waives the protection); *Anderson v. State*, 43 P.3d 108, 120 (Wyo. 2002) (stating that revocation of parole may not be based solely on hearsay, and if any hearsay is admitted the court must use a balancing test).

519. See *Escoe v. Zerbst*, 295 U.S. 490, 492–93 (1935).

520. *Id.*

521. *Id.*

522. See *Hong*, *supra* note 125, at 259.

523. See *id.*

524. See *id.*

525. See Shaakirrah R. Sanders, *The Value of Confrontation as a Felony Sentencing Right*, 25 WIDENER L.J. 103, 127 (2016) [hereinafter Sanders II].

526. *Id.*

527. *Id.* at 158.

government at the hearing.⁵²⁸ Judges rarely look deeply into the facts of a crime before accepting a plea.⁵²⁹ A revocation hearing may be the first time a court is looking closely at facts that will inform a revocation or subsequent punishment.⁵³⁰ The prosecutor has a professional duty to ensure there is probable cause before charging a person with a crime.⁵³¹ Probable cause determinations are not required in a revocation hearing, so they can lead to unfortunate outcomes.⁵³²

There are a number of theories or justifications for the judge's decision to send someone to jail or prison after determining the person violated conditions.⁵³³ The first is the judge punishes the person for the underlying offense.⁵³⁴ The second, related to the first, is that when the judge revokes and incarcerates a person, the resulting sentence was merely delayed from the date of the original plea of guilt.⁵³⁵ The third is that the judge punishes not only on the original crime, but for the violations, including new crime violations.⁵³⁶ It is particularly worrisome when a judge punishes primarily for new criminal conduct with few, if any, of the safeguards at trial and a lower burden of proof.⁵³⁷ Regardless of which theory any given judge or jurisdiction adopts, the decision to punish through revocation and incarceration should be based on factual proof of violations.⁵³⁸

It should be of interest to *all* parties—the judge as fact finder, the prosecutor as the person charged with seeking justice, and the defense—to ensure facts that influence the sentence are accurate.⁵³⁹ The Supreme Court has repeatedly stated that confrontation promotes the discovery of the

528. *Id.* at 164.

529. *Id.*

530. *Id.*

531. *Gerstein v. Pugh*, 420 U.S. 103, 122 n.22 (1975).

532. *Id.*

533. *See Fish*, *supra* note 2, at 1406.

534. *Id.*; *Schuman I*, *supra* note 7, at 1839.

535. *Fish*, *supra* note 2, at 1406; *Mempa v. Rhay*, 389 U.S. 128, 137 (1967) (calling the revocation process a delayed sentencing).

536. *Fish*, *supra* note 2, at 1406; *e.g.*, *Sopko v. State*, 637 S.W.3d 252, 259 (Tex. App.—Fort Worth Dec. 16, 2021, no pet.) (“This exchange reveals that the trial court’s sentence was grounded on Sopko’s probation performance rather than the severity of the underlying offense.”).

537. *Schuman I*, *supra* note 7, at 1892. The concept of what the probationer is being punished for contradicts a statement in *Doan* that the facts are fixed in a revocation hearing. *Ex parte Doan*, 369 S.W.3d 205, 212 (Tex. Crim. App. 2012). While the underlying crime’s facts may be fixed, the condition violations and any new criminal conduct is not. *See Schuman I*, *supra* note 7, at 1892. There are new facts, new allegations, and new information at a revocation hearing that influence the judge’s punishment decision. *See id.* Moreover, the judge often has more facts of the underlying offense available at a revocation hearing than at the plea, but perhaps less than at a trial that resulted in a punishment of probation. *See id.* However, many more probations are granted from pleas than trials. *See id.*

538. *See Doan*, 369 S.W.3d at 212.

539. *Sanders I*, *supra* note 176, at 1289; *Commonwealth v. Durling*, 551 N.E.2d 1193, 1198 (Mass. 1990) (“The interests of the probationer and the Commonwealth cross at one point: both have an interest in a reliable, accurate evaluation of whether the probationer indeed violated the conditions of his probation.”).

truth.⁵⁴⁰ Courts should be particularly aware of the dangers that arise when a statement is material to punishment yet there is no opportunity to test its truth through cross-examination.⁵⁴¹ The judge has a duty to ensure due process at these proceedings.⁵⁴²

Punishment considerations following a trial or plea differ from the punishment considerations at a revocation hearing.⁵⁴³ The initial sentencing is based upon a number of factors: the crime, the defendant's criminal history, and the concerns of the community.⁵⁴⁴ While some may think the concerns in a revocation hearing are the same, they are not.⁵⁴⁵ The concerns are whether the person is in fact being rehabilitated, whether tweaks in the conditions need to be made to salvage or make the probation more effective, whether there is value in keeping the person in the community, and whether the probation should be terminated early because of the person's success and good behavior, or extended due to condition violations.⁵⁴⁶ Each of these considerations need to be based on facts, not hearsay.⁵⁴⁷

The Supreme Court has long required that sentences and punishments be based on facts and truth.⁵⁴⁸ In *Escoe*, the Court was compelled to create a factual inquiry to ensure punishment was not based on rumor, mistake, or malice.⁵⁴⁹ The *Escoe* Court wanted decisions to be based on true and reliable evidence.⁵⁵⁰ The *Townsend* Court confronted materially false evidence and its careless admission, which formed the foundation of the sentence.⁵⁵¹

In *Morrissey*, the Court emphasized the importance of having an accurate representation of facts.⁵⁵² Probation revocations are premised on new law violations, lab reports, scientific evidence, and other allegations grounded in live witnesses and processes that demand cross-examination and confrontation.⁵⁵³ The *Morrissey* Court failed to consider the *facts* upon which violations are based, which led to a short-sighted approach to confrontation.⁵⁵⁴

540. *Kentucky v. Stincer*, 482 U.S. 730, 736 (1987); *White v. Illinois*, 502 U.S. 346, 356–57 (1992); *Coy v. Iowa*, 487 U.S. 1012, 1020 (1988).

541. *Sanders I*, *supra* note 176, at 1263.

542. LAFAYETTE ET. AL, *supra* note 63, § 26.10(a).

543. *See id.*

544. *See id.*

545. *See id.*

546. *See id.*

547. *See id.*

548. *See generally* *Escoe v. Zerbst*, 295 U.S. 490 (1935) (a deep probe capable of determining the facts of the accusation is required); *Townsend v. Burke*, 334 U.S. 736 (1948) (sentences must be based on accurate information that was correctly admitted into the court); *Morrissey v. Brewer*, 408 U.S. 471 (1972) (accurate information is important to the process of parole revocation).

549. *Escoe*, 295 U.S. at 492–93.

550. *Id.*

551. *Townsend*, 334 U.S. at 740–41.

552. *Morrissey*, 408 U.S. at 480.

553. *Id.* at 489–90.

554. *See id.* at 491–92 (1972) (Douglas, J., dissenting).

Justice Douglas, in the *Morrissey* dissent, raised concerns that the basis for the probationer's detention cannot be based on false evidence.⁵⁵⁵ He recognized the entire purpose of the hearing is to determine *the fact of the condition violation*.⁵⁵⁶ "Society only benefits from a revocation when there is an accurate and reliable ground" to believe the person has violated judge-ordered conditions and can no longer be rehabilitated.⁵⁵⁷

Verified facts get lost when judges permit unreliable hearsay.⁵⁵⁸ The Framers "knew that judges, like other government officers, could not always be trusted to safeguard the rights of the people."⁵⁵⁹ They were uneasy about allowing judges to make evidentiary decisions based on what they deemed reliable evidence.⁵⁶⁰ When testimonial statements are material to punishment, confrontation is necessary to assess the truth and veracity of the statements.⁵⁶¹

Confrontation ensures the facts are accurate and the fact-finder is hearing reliable, tested evidence.⁵⁶² That purpose is no less important at punishment, sentencing, or revocation than it is in the guilt-innocence phase of trial.⁵⁶³ The *Morrissey* Court recognized that the revocation hearing must be structured to ensure the hearing is based on "verified facts . . . informed by an accurate knowledge of the parolee's behavior."⁵⁶⁴ Anything less does not even meet the Due Process Clause's minimum requirements set out in that case, which was meant to be the baseline for rights.⁵⁶⁵ States can and should set the bar higher.⁵⁶⁶

C. Revocation Is Adversarial, and It Is a Criminal Proceeding

The crux of this last point begins with the Supreme Court inadvertently creating a wrong path for states in the 1970s.⁵⁶⁷ The *Morrissey* Court clarified it was not writing the procedure for all states, but merely setting the minimum due process requirements.⁵⁶⁸ When the Supreme Court did this, it expressed a strong interest in avoiding an adversarial process for those who violated conditions of parole.⁵⁶⁹ That may make more sense among a population of

555. *Id.* at 499.

556. *Id.*

557. *Commonwealth v. Durling*, 551 N.E.2d 1193, 1198 (Mass. 1990).

558. *See id.* at 1197.

559. *Crawford v. Washington*, 541 U.S. 36, 67 (2004).

560. *Id.*

561. *See Sanders II*, *supra* note 525, at 168–69; *Morrissey*, 408 U.S. at 484.

562. Benjamin E. Rosenberg, *Criminal Acts and Sentencing Facts: Two Constitutional Limits on Criminal Sentencing*, 23 SETON HALL L. REV. 459, 497 (1993).

563. *See id.*; *Morrissey v. Brewer*, 408 U.S. 471, 484 (1972).

564. *Morrissey*, 408 U.S. at 484.

565. *See id.* at 484–86.

566. *Id.* at 486.

567. *See id.* at 488–90.

568. *See id.*

569. *See id.* at 483.

individuals who committed felony offenses, who have broken the conditions of early release from prison sentences.⁵⁷⁰ However, this makes less sense in a probation case, where no original fact-finder deemed the person fit for a prison sentence.⁵⁷¹

Morrissey, a parole case, influenced *Scarpelli*, a probation case, which influenced probation revocation procedures, sometimes even changing them, in states with processes that looked nothing like those the Supreme Court examined.⁵⁷² *Morrissey* characterized parole hearings as purely administrative, laying outside the original court's jurisdiction, with a far-removed board of parole.⁵⁷³ The Court considered this in structuring the rights available at a parole hearing.⁵⁷⁴

The *Scarpelli* Court feared an adversarial process would bring revocations to an end because they could become too burdensome for the states.⁵⁷⁵ Yet, Texas and other states have a thriving adversarial process.⁵⁷⁶ The Supreme Court was even concerned about allowing probationers the right to counsel in this proceeding for fear it would take more time and require more government resources.⁵⁷⁷ Revocation hearings are inherently adversarial because a person's liberty is at stake, and the outcome could impact their criminal record and future criminal punishments.⁵⁷⁸ This adversarial process should change the confrontation rights granted at these hearings.⁵⁷⁹

From *Hill* to *Doan*, a span of forty years, Texas courts adhered to *Morrissey* and *Scarpelli* before realizing the processes described in these cases were nothing like the Texas process.⁵⁸⁰ In many states, the adversarial process extends from trial or plea through sentencing.⁵⁸¹ The *Cunningham* court believed Texas revocation proceedings cannot be isolated from the rest of the criminal prosecution.⁵⁸²

Let's focus on that last phrase in the last sentence: criminal prosecution. It could be interpreted in various ways.⁵⁸³ In *Crawford*, Justice Scalia cited an 1828 dictionary; that same dictionary defines criminal prosecution as one

570. See LAFAVE ET AL., *supra* note 63.

571. See *Morrissey*, 408 U.S. at 475 (distinguishing parole from probation revocation cases on the grounds that probation revocations were still part of ongoing criminal proceedings).

572. *E.g.*, *Ex parte Doan*, 369 S.W.3d 205, 208–09 (Tex. Crim. App. 2012) (providing background on the evolution of federal due process minimums for parole and probation revocation proceedings).

573. *Morrissey*, 408 U.S. at 480.

574. See *id.*

575. *Gagnon v. Scarpelli*, 411 U.S. 778, 787–88 (1973).

576. *Scarpelli*, 411 U.S. at 787–88.

577. *Id.*

578. See *Morrissey*, 408 U.S. at 496 n.6 (Douglas, J., dissenting) (clarifying the practical differences between parole and probation).

579. See *id.*; *Ex parte Doan*, 369 S.W.3d 205, 206 (Tex. Crim. App. 2012).

580. *Hill v. State*, 480 S.W.2d 200, 202–203 (Tex. Crim. App. 1972); *Doan*, 369 S.W.3d at 206.

581. See *Sanders I*, *supra* note 176, at 1259.

582. *Cunningham v. State*, 673 S.W.3d 280, 291 (Tex. App.—Texarkana 2023, no pet.).

583. See *id.*

that lasts from the charge to the final judgment.⁵⁸⁴ This definition could include sentencing,⁵⁸⁵ even revocation.⁵⁸⁶

The *Doan* court hinged its decision that the revocation process in Texas is not an administrative proceeding, but a judicial proceeding, on the fact that the process in Texas is more adversarial.⁵⁸⁷ A revocation hearing in Texas and elsewhere looks like a trial: witnesses are called, attorneys represent both sides, they argue, rules of evidence apply, the same judge oversees both the original proceeding and the revocation, and the same range of punishment and punishment options apply if the judge finds the allegations are true.⁵⁸⁸ For these reasons, the same rights at trial should apply to the revocation hearing, especially the right to confront adverse witnesses.⁵⁸⁹

VI. CONCLUSION

Texas was wrong to let the Supreme Court cases on parole and probation revocations dictate its revocation procedures because those cases described revocation processes that have never existed in Texas.⁵⁹⁰ Texas was not in lockstep with Iowa or Wisconsin procedures, or the Supreme Court's remaking of those procedures; they bear no semblance to Texas's revocation proceedings.⁵⁹¹ Texas has a uniquely adversarial process that requires greater safeguards and rights to probationers facing revocation.⁵⁹²

Judges should not admit unreliable, testimonial hearsay at these hearings.⁵⁹³ They should not allow witnesses without personal knowledge to testify.⁵⁹⁴ The Sixth Amendment Confrontation Clause should apply to Texas probation revocation hearings.⁵⁹⁵ The reasons the Framers included the Confrontation Clause mirror the arguments defendants facing revocation raise today.⁵⁹⁶

If the Texas Court of Criminal Appeals rules the Sixth Amendment Confrontation Clause does not apply, there are reasons to revisit the good

584. Doty, *supra* note 229, at 564–65.

585. *Id.*

586. *Cunningham*, 673 S.W.3d at 290; *cf.* Doty, *supra* note 229, at 563–65 (discussing how the definition of prosecution encompasses sentencing as well).

587. *Ex parte Doan*, 369 S.W.3d 205, 208–209 (Tex. Crim. App. 2012).

588. *Id.* at 20.

589. *See Cunningham*, 673 S.W.3d at 290–92.

590. *See Doan*, 369 S.W.3d at 209–10.

591. *See Whisenant v. State*, 557 S.W.2d 102, 103 (Tex. Crim. App. 1977) (“In both *Morrissey v. Brewer* . . . and *Gagnon v. Scarpelli* . . . the Supreme Court of the United States considered procedures far different from those in this state.”).

592. *See id.*; *Cunningham*, 673 S.W.3d at 290–91.

593. *See Sanders II*, *supra* note 525, at 108–109, 168.

594. *See Commonwealth v. Durling*, 551 N.E.2d 1193, 1199 (Mass. 1990) (emphasizing the importance of reliable grounds for revoking probation).

595. *Cunningham*, 673 S.W.3d at 290–93.

596. *See Hong*, *supra* note 125, at 239.

cause standard the U.S. Supreme Court set in *Morrissey* and *Scarpelli*.⁵⁹⁷ Texas's uniquely adversarial revocation process includes many of the rights the Supreme Court worried would overburden the government in these decisions.⁵⁹⁸ This renders those concerns moot.⁵⁹⁹ Regardless, our adversarial process requires more due process, not less.⁶⁰⁰ Without more safeguards, people facing a threat to their liberty have no way to challenge unreliable hearsay used as evidence in these hearings.⁶⁰¹ State and judicial efficiency is not a persuasive justification for denying confrontation rights or ensuring due process fairness and guarantees.⁶⁰² Texas's adversarial process requires more due process than the Supreme Court, who sought to avoid an adversarial process at all costs, granted in its cases, not the same, and certainly not less.

597. See *Ex parte Doan*, 369 S.W.3d 205, 209–210 (Tex. Crim. App. 2012); *Gagnon v. Scarpelli*, 411 U.S. 778, 787–88 (1973).

598. See *Doan*, 369 S.W.3d at 209–10; *Scarpelli*, 411 U.S. at 787–898.

599. See *Scarpelli*, 411 U.S. at 787–88.

600. See *Cunningham*, 673 S.W.3d at 290–93; see also *Hong*, *supra* note 125, at 239 (explaining the Founders' preferences for cross-examinations as compared to judicial determinations of reliability).

601. See *Cunningham*, 673 S.W.3d at 291.

602. *Scarpelli*, 411 U.S. at 787–88.